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"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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# PROFESSOR DICEY.

PROFESSOR DICEY must beyond all question be ranked as one of the foremost of modern English lawyers. He has during the course of a long and laborious life applied himself with single-minded devotion to the study of the law of England, expounding it in the first place to his students and then, by his published works, to the legal profession and to the public at large.

From his early days he was destined for the profession of the law, being perhaps inspired by the example and having inherited the talents of some of the distinguished legal family of Stephen to which he is closely related. He came up to Oxford as an undergraduate in 1854, and had a highly successful curriculum, obtaining a First Class in the Schools and soon thereafter a Fellowship at Trinity College. He gained the Arnold Prize in 1860, the subject of his essay being the Privy Council. Among his tutors at Balliol was the late Henry J. S. Smith, to whom he has always expressed much indebtedness, and among his contemporaries were Professors John Nichol, T. E. Holland and Viscount Bryce (the latter slightly his junior). Leaving Oxford soon after he obtained his Fellowship, he went to London to seek his fortunes at the Bar, and gradually acquired a moderate amount of practice. For a time he acted as "devil" to the late Chief Justice Coleridge. But his tastes leant more to the scientific and academic side of the profession than to the forensic, and he soon turned his attention to legal literature. Perhaps a slight infirmity in the hands interfering with his penmanship may have influenced him, but however this be, when the Vinerian Chair of English Law became vacant by the death of Professor Kenyon, he became a candidate, and was elected to it in 1882. He thereupon became, *vi statuti*, a Fellow of All Souls' College, to which college he has always remained warmly attached.

Into the work of the Chair he threw himself with ardour, stimulating his students both with tongue and with pen, and it is in no

small measure due to him that the Oxford School of Law has grown up from a small and rather neglected body to be one of the most important and flourishing in the University. He has supported all movements for its reform and advancement, he has taken frequent part in the periodical examinations, and has always been keen to keep them up to the level of a good standard. In particular it may be mentioned, the University Statute by which students holding degrees of outside universities (*e.g.* Rhodes scholars) may, after a certain period of residence and study, enter for the examination and obtain the degree of B.C.L., was largely due to his initiative. Previously this examination had been restricted to candidates who had taken the Oxford B.A.

Professor Dicey has contributed a very considerable amount to legal literature, and all, or nearly all, his writings have had a large measure of success. They are all characterised by a lively and graceful style and eminently readable, the author in this respect showing a good many of the qualities of his great predecessor in the Vinerian Chair, Sir William Blackstone. One of his earliest works, published so far back as 1870, is his *Parties to an Action*, from which, though now, owing to statutory changes in procedure, rather antiquated, a good deal that is valuable in practice may still be learned. His two principal books, however, are his *Law of the Constitution*, first published in 1885 (now in its sixth edition), and his treatise on *The Conflict of Laws*, first published in 1896 (second edition 1908). Both of these have become standard works. The last mentioned incorporated an earlier work by him on the Law of Domicil. As to the scope and purpose of his *Law of the Constitution*, we will use the author's own words in his preface:

> This book is (as its title imports) an introduction to the study of the law of the constitution; it does not pretend to be even a summary, much less a complete account of constitutional law. It deals only with two or three guiding principles which pervade the modern constitution of England. My object in publishing the work is to provide students with a manual which may impress these leading principles on their minds, and thus may enable them to study with benefit in Blackstone's *Commentaries* and other treatises of the like nature those legal topics which, taken together, make up the constitutional law of England.

The late Sir William Anson, in the preface to his book *Law and*

*Custom of the Constitution*, says, in contrasting it with that of Professor Dicey :

> He has drawn with unerring hand those features which distinguish our constitution from others, and has given us a picture which can hardly fail to impress itself on the mind with a sense of reality. I have tried to map out a portion of its surface and to fill in the details. He has done the work of an artist. I have tried to do the work of a surveyor.

This is too modest an estimate of the character of Sir William's own excellent book, but it truly describes that of Professor Dicey. It may well be compared to an elegant architectural work in which the details of the construction are not presented to the view. His *Conflict of Laws* is confined strictly to international law as part of the law of England, and presents the rules on the subject in the form of a well-arranged digest.[1] It does not, like the works of Westlake, von Bar and others, attempt to discuss the principles of the law, or, except in a few appended notes, deal with continental and other non-British authorities.[2] Its constant citation in the Law Courts is sufficient evidence of its high authority and utility.

Another work of Professor Dicey which has acquired much popularity and thrown not a little light upon constitutional law and politics is his *Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century*. It was published in 1905.

Professor Dicey has at all times taken a considerable interest in politics, and has by public speeches (he is a lively and forcible speaker), letters to the press, pamphlets, etc., mostly polemical, dealt with various party questions. His political bent has been on the whole towards Liberalism, but a Liberalism of the old school of individualism and *laissez faire*—the school of Bentham ; he has shown little sympathy with the modern trend towards Socialism and State control. Two questions which have, more than others, interested him have been Home Rule for Ireland and Female Suffrage. Of the former he has been a strenuous and consistent opponent, quite intransigent, since the day when Mr. Gladstone introduced his first Home Rule Bill. He has been and is opposed to

[1] Its full title is *A Digest of the Law of England with Reference to the Conflict of Laws*.

[2] The first edition contains notes of American decisions by J. Bassett Moore, but these have been omitted in the second edition.

all compromise on the subject, even to the proposal of local parliaments for the several parts of the United Kingdom or so-called "Home Rule all round." His views on the latest Home Rule Bill are to be found in a volume published in 1913, and entitled *A Fool's Paradise*. On the suffrage question he has not been consistent. He at first favoured it, but latterly has changed his attitude, and is now opposed to it. His present opinions on the question are contained in a small volume of letters to a friend, published in 1909.

A few years ago Professor Dicey, feeling the infirmities of advanced age (he is now an octogenarian), resigned the Vinerian Chair, but he has by no means ceased to interest himself in literary and academic pursuits. Re-elected to an All Souls' Fellowship, he remains in Oxford busy with his pen, and even occasionally giving instruction to students, while enjoying with his amiable and accomplished wife the esteem and affection of his colleagues and his friends. He has received numerous academic honours; he is honorary D.C.L. of Oxford and LL.D. of Cambridge, and Honorary Fellow of Balliol and Trinity Colleges, Oxford. *Huic iam rude donato vitaque fruenti umbratili multos annos atque felices precamur!*

# TREATY-MAKING POWERS OF THE DOMINIONS.

[*Contributed by* The Hon. Sir C. Hibbert Tupper, K.C.M.G., K.C., M.P.]

Section 132 of the British North America Act, 1867, reads as follows :

The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

The development of the rights of the Dominions in connection with the treaty power is illustrated by the political history of Canada since the above legislation, when this Dominion was created.

The constitutional power of the so-called Imperial Parliament is not now used to compel its commercial policy with other countries to be adopted in the Dominions. The self-governing Colonies after considerable demur on the part of the Colonial Office are permitted to regulate their own trade policy, subject always to this, that it be not such as to infringe upon obligations incurred by the Mother Country in her treaties.

**The Delegation of the Treaty-making Power.**—International law undoubtedly requires a Sovereign Power in the completion of a treaty. This right, however, can be delegated, the responsibility remaining of course with the Sovereign Power to the same extent as for the acts of any other public accredited agents of the Crown.

On the other hand, the Legislature in any Dominion is free to determine whether or not to pass laws necessary to give effect to a treaty entered into between the British Government and any foreign power, but in which such Colony has a direct interest.

While the principle obtained that the negotiation of treaties with foreign powers, being a matter of Imperial concern, should be conducted only by agents specially authorised by the Crown, and by

ministers directly responsible to the British Parliament, on many occasions in the negotiation of treaties between Her Majesty and the United States of America which have a special bearing upon Canadian interests, Canada has been directly represented, and latterly Canada has conducted negotiations directly with foreign Governments.

The history of the gradual development of this power may be traced with advantage.[1]

**The Desire for Independent Negotiations.**—In 1870 a motion was introduced in the Canadian House of Commons for an address to the Governor-General to urge the expediency of obtaining from the Imperial Government powers to enable the Government of the Dominion to enter into direct communication with other British possessions, and with foreign powers, for the purpose of extending the trade and commerce of Canada abroad. An amendment was carried deprecating any attempt to enter into treaties with foreign powers "without the strong and direct support of the Mother Country," and asserting that the object in view "can be best obtained by the concurrent action of the Imperial and Canadian Governments."

In 1871 Sir John A. Macdonald, Prime Minister of Canada, was appointed a Plenipotentiary of Her late Majesty on a Joint High Commission with the United States of America which *inter alia* concerned the Atlantic fisheries of Canada. He was one of several others appointed who, as he put it, were "Englishmen having little or no interest in Canada," but he made it a *sina qua non* that the provision of any Convention relating to Canadian interests would be inoperative until ratified by the Canadian Parliament. The correspondence (published since his death) between Sir John and his Government at Ottawa clearly establishes that he surmounted many difficulties with his British colleagues, and that but for him the Treaty of Washington (1872) would have failed in securing the assent of the Canadian Parliament.

In the years 1871, 1872, and 1873 correspondence took place between the Imperial and Australian Governments, with a view to the modification of the treaty-making power, so as to enable the principal Colonies of Great Britain to make reciprocal trade arrangements with foreign States. The Imperial Government did not

[1] The following historical review is taken largely from *The Kingdom Papers* published by Mr. Ewart, K.C., of the Canadian Bar.

surrender prerogative rights, but consented to such a modification of the existing practice as would place the Australian Colonies in a position towards each other similar to that of the Provinces which form part of the Dominion of Canada. This concession was embodied in the Australian Colonies Duties Act, 1873.

In 1874 the Hon. George Brown, a Canadian statesman, was appointed as one of two Plenipotentiaries to negotiate a treaty with the United States with reference to commerce, navigation, and fisheries. Canada had an equal voice in the negotiations, but no treaty resulted.

Mr. Brown's biographer writes :

> This mode of representation was insisted upon by the Mackenzie Government, in view of the unsatisfactory results of the negotiations of 1871, when Sir John Macdonald, as one commissioner out of six, made a gallant but unsuccessful fight for the rights of Canada.[1]

In 1879, in connection with the appointment of a High Commissioner in London, the Canadian Government expressed the opinion to the British Government :

> that the very large, and rapidly augmenting, commerce of Canada, and increasing extent of her trade with *foreign nations*, is proving the absolute necessity of *direct negotiation* with them for the proper protection of her interests. In most of the treaties of commerce entered into by England, reference has only been had to their effect on the United Kingdom, and the Colonies are excluded from their operation, a fact which has been attended with most unfortunate results to Canada as relates to France. . . . The Canadian Government, therefore, submit that when needs occasion such negotiations to be undertaken, Her Majesty's Government should advise Her Majesty specially to accredit the representative of Canada to the foreign Court, by association, for the special object, with the resident Minister or other Imperial negotiator.

**Canadian Plenipotentiaries.**—Sir A. T. Galt, the Canadian High Commissioner, commenced his diplomatic activities (1879) with an attempt at negotiations with Spain. But he could do nothing. He had to communicate through the British Ambassador, and as Sir Charles Tupper (subsequently Prime Minister of Canada) quoted him :

> He said that he found himself greatly hampered in discharging the duties imposed upon him by the Government of Canada, because he only

[1] John Lewis: *Life of George Brown*, p, 227.

stood in the position of a commercial commissioner, and it was necessary that all his negotiations with the Government of Spain *should be filtered through Her Majesty's Minister* at the Court of Madrid.

In 1880 and 1881 correspondence passed between Sir A. T. Galt, on behalf of Canada, and the Colonial and Foreign Offices. The Imperial Government consented that the Government of Canada should hereafter be relieved from the obligation of any new treaties with foreign powers to which objection was taken; that Canada should have the option of acceptance or refusal; and that her High Commissioner should be, as far as practicable, associated with the Imperial agents in the negotiation of all foreign treaties in which Canada was interested.

Sir Charles Tupper, a member of the Canadian Government, was appointed in 1883 (also in 1888) co-plenipotentiary, with Imperial representatives, to conduct negotiations with Spain, likewise in the latter year to negotiate with the United States; and again in 1892–3 to regulate commercial relations between Canada and France respecting customs tariffs.

In 1882 Mr. Edward Blake moved in the House of Commons the following resolution:

> That it is expedient to obtain all necessary powers to enable Her Majesty, through her representative, the Governor-General of Canada, acting by and with the advice of the Queen's Privy Council for Canada, to enter, by an agent or representative of Canada, into *direct communication* with any British possession or *foreign State*, for the purpose of negotiating commercial arrangements tending to the advantage of Canada, subject to the prior consent or the subsequent approval of *the Parliament of Canada*, signified by Act.

Sir John A. Macdonald, leader of the Canadian Government, said in reply that by Canada demanding power to enter into direct negotiations with foreign countries for the purpose of negotiating commercial arrangements, "this means separation and independence."

In 1887, at the Colonial Conference of that year, Sir Dillon Bell (New Zealand) proposed

> that Colonial Governments should be allowed to negotiate commercial treaties with foreign powers under the direction and supervision of Her Majesty's Ambassadors at foreign courts.

**Mr. Bayard's Criticisms.**—Sir Charles Tupper when Minister of Finance for Canada received from Mr. Bayard (Secretary of State for United States) a letter (May 31, 1887) marked "Personal and unofficial," agreeing to oral negotiations between Canada and the States. The following are passages from Mr. Bayard's letter which indicate a departure from former diplomatic procedure when the "filtering" through the British Ambassador at Madrid was necessary in dealing with Spain.

In the very short interview afforded by your visit, I referred to the embarrassment arising out of the gradual emancipation of Canada from the control of the Mother Country, and the consequent assumption by that community of attributes of autonomous and separate sovereignty, not, however, distinct from the Empire of Great Britain.

The awkwardness of this imperfectly developed sovereignty is felt most strongly by the United States, which cannot have formal treaty relations with Canada, except indirectly and as a colonial dependency of the British Crown; and nothing could better illustrate the embarrassment arising from this amorphous condition of things than the volumes of correspondence published, severally, this year, relating to the fisheries, by the United States, Great Britain, and the Government of the Dominion.

The time lost in this circumlocution, although often most regrettable, was the least part of the difficulty, and the indirectness of appeal and reply was the most serious feature, ending, as it did, very unsatisfactorily.

It is evident that the commercial intercourse between the inhabitants of Canada and those of the United States has grown into too vast proportions to be exposed much longer to this wordy triangular duel, and more direct and responsible methods should be resorted to.

I presume you will be personally constituted a plenipotentiary of Great Britain to arrange here, with whomsoever may be selected to represent the United States, terms of arrangement for a *modus vivendi* to meet present emergencies and also a permanent plan to avoid all future disputes.

The gravity of the present conditions of affairs between our two countries demands entire frankness.

I feel we stand at "the parting of the ways." In one direction I can see a well-assured, steady, healthful relationship, devoid of petty jealousies, and filled with the fruits of a prosperity arising out of a friendship cemented by mutual interests, and enduring because based upon justice; on the other, a career of embittered rivalries, staining our long frontier with the hues of hostility, in which victory means the destruction of an adjacent prosperity without gain to the prevalent party—a mutual physical and moral deterioration which ought to be abhorrent to patriots

on both sides, and which I am sure no two men will exert themselves more to prevent than the parties to this unofficial correspondence.

The roundabout manner in which the correspondence on the fisheries has been necessarily (perhaps) conducted has brought us into a new fishing season, and the period of possible friction is at hand, and this admonishes us that prompt action is needed.

I am prepared, therefore, to meet the authorised agents of Great Britain at this capital at the earliest possible day, and enter upon negotiations for a settlement of all differences.

In replying, Sir Charles said (June 10, 1887):

I note particularly your suggestions that as the interests of Canada are so immediately concerned, Her Majesty's Government should be invited to depute a Canadian statesman to negotiate with you "a *modus vivendi*" to meet present emergencies, and also a "permanent plan to avoid all disputes," and I feel no doubt that a negotiation thus undertaken would greatly increase the prospects of a satisfactory solution.

I say this, not because I believe that there has been any disposition on the part of the British Government to postpone Canadian interests to its own, or to retard by needless delay a settlement desired by and advantageous to the people of Canada and of the United States, but because I have no doubt that direct personal communication will save valuable time and render each side better able to comprehend the needs and the position of the other.

In the result an arrangement was made for a conference at which all outstanding questions between the two countries, including the Behring Sea seal fisheries, the Alaska boundary, and the Atlantic fisheries were to be discussed, and if possible disposed of.

Sir Charles Tupper was later on appointed a joint Plenipotentiary with Mr. Chamberlain and Sir Lionel Sackville West, the British Minister in Washington. This resulted in a treaty settling the dispute over the Atlantic fisheries, and in a letter of February 18, 1888, Mr. Chamberlain wrote to Sir Charles as follows:

I congratulate you most heartily on the result of our labours, which is so largely due to your knowledge, tact, and firmness. In my opinion you have done enormous service to Canada and Great Britain.

If the treaty be adopted it will remove the long-standing causes of irritation between the Dominion and the United States, and pave the way for more complete intercourse of all kinds.

**Action of the Canadian Parliament.**—On February 18, 1889, Sir Richard Cartwright, then in opposition, moved in the House of Commons of Canada :

1. That it has become a matter of extreme importance to the well-being of the people of this Dominion that the Government and Parliaments of Canada should acquire the power of negotiating commercial treaties with foreign States.

2. That an humble Address be presented to Her Majesty, praying that she will empower her Representative, the Governor-General of Canada, acting by and with the advice of the Queen's Privy Council for Canada, to enter, by an agent or representative of Canada, into direct communication with any foreign State for the purpose of negotiating commercial arrangements tending to the advantage of Canada, subject to the prior consent or subsequent approval of the Parliament of Canada, signified by Act.

He said in support of this that Canada needed the power to negotiate her own commercial treaties, and that Canada required in certain cases, at all events, " the right to appoint and to maintain agents of her own, responsible to her Parliament and responsible to her people, who will know better than those of any other country can do what are the real wants of the people of Canada, and who will keep our Government informed of the feelings of other nations."

In reply Mr. Foster (now Sir George Foster, Minister of Trade and Commerce for Canada) said :

We find an increasing liberality in these matters, until we come to our position as it exists to-day, when Sir Charles Tupper, the High Commissioner in London, was not only allowed, as representing Canada, to take part in the negotiations for a treaty at Madrid with Spain and the Spanish West Indies, but was nominated as a co-plenipotentiary with the British Minister at Madrid, and was expressly given the authority to conduct the negotiations after he had been introduced by the British Ambassador resident at Madrid.

In 1891 an address to the Queen was adopted by the Canadian Senate and House of Commons. Some years previously, commercial treaties had been made with Germany and Belgium by the United Kingdom without Canada's assent having been asked, and without any consideration of her interests. These treaties contained the most-favoured-nation clause, and Canada, therefore, in making

agreements with other countries, found herself embarrassed by the fact that every concession which she made to other countries passed automatically to those two countries. Canada asked for the termination of these treaties, and in her address she declared :

that these provisions in treaties with foreign powers are incompatible with the rights and powers subsequently conferred by the British North America Act upon the Parliament of Canada, for the regulation of the trade and commerce of the Dominion ; and that their continuance in force tends to produce complications and embarrassments in such an Empire as that under the rule of Your Majesty, *wherein the self-governing Colonies are recognised as possessing the right to define their respective fiscal relations to all foreign nations,* to the Mother Country, and to each other.

But the Colonial Secretary, in declining to comply with Canada's request, said (April 2, 1892) :

In so far as the right here claimed consists in fixing rates of customs duties applying equally to all foreign nations, the Mother Country, and the British Colonies, Her Majesty's Government do not contest the statement. But if the statement is to be taken as extending to a claim of right to establish discriminating treatment between different foreign nations, or against the Mother Country, or in favour of particular Colonies, Her Majesty's Government are obliged to point out that the claim is stated too broadly ; for no such general right has hitherto been recognised, nor is it clear that it would be admitted by foreign countries.

In 1892 Mr. Dalton McCarthy (a Conservative, but at the time at enmity with the Government) moved, in the House of Commons of Canada, a resolution affirming the necessity for the appointment of a Canadian representative at Washington. The Government amendment (proposed by Sir Charles Tupper) was carried and it ran as follows :

It is expedient that communications be opened with Her Majesty's Government in order to bring about such fuller representation of Canadian interests at Washington, and at the capitals of other countries in which such other representation may be found desirable, as may be consistent with the proper relations which should exist between Great Britain and Canada.

**Treaty with France.**—In 1907 the Canadian Government, through Messrs. Fielding and Brodeur (in nominal association with the British Ambassador at Paris), negotiated a commercial treaty

with France. Upon this occasion, the only knowledge which the British Government, or the British Ambassador, had of the proceeding was, as Mr. Balfour afterwards said, "a purely technical knowledge." It was Mr. Fielding, a Canadian statesman, who wrote from Paris to the British Foreign Office saying that the treaty was nearly ready, and asking that arrangements might be made for its adoption without delay.

**Department of External Affairs.**—In 1909, following the example of Australia (1900), the Parliament of Canada created a Department of External Affairs.

It has been said of the clause in the Australian Commonwealth Act assigning to the Federal Parliament jurisdiction respecting "external affairs" that "it will look, I should submit, as though the Imperial Parliament intended . . . to divest itself of its authority over the external affairs of Australia, and commit them to the Commonwealth Parliament."

This was not the interpretation placed upon the clause either by Australia or by the Colonial Office. Australia conceded that what was meant was "affairs external to the Commonwealth, not external to the Empire," and the Colonial Secretary declared that Australia had power "to deal with all political matters arising between them and any other part of the Empire; or (*through His Majesty's Government*) with any foreign power." Australia was not to correspond *directly* with foreign powers.

In 1909 Mr. Asquith is reported as saying:

> It is understood that the Canadian Government propose to establish a Department of External Affairs. This Department is merely intended —like the corresponding Department of the Commonwealth Government —to conduct correspondence with the Secretary of State for the Colonies, and Her Majesty's Ambassador at Washington, and with the several Departments of the Canadian Government. No suggestion has been made by the Canadian Government for the increase of their powers in dealing with external affairs.

The statute of Canada (8 & 9 Ed. VII. No. 13) nevertheless expressly refers to negotiations with foreign countries:

> The Secretary of State . . . shall have the conduct of all official communications between the Government of Canada and the Government of *any other country* in connection with the external affairs of Canada,

and shall be charged with such other duties as may, from time to time, be assigned to the department by order of the Governor in Council in relation to such external affairs, or to the conduct and management of *international* or intercolonial negotiations, so far as they may appertain to the government of Canada.

**Treaty with United States.**—In 1910 an arrangement was made with the United States by which all questions of difference between Canada and them were referred to a joint commission[1] composed of three Canadians (appointed not by the British Government, but by Canada) and three Americans. Art. 10 commences this way :

> Any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada, either in relation to each other or to their respective inhabitants, may be referred for decision to the International Joint Commission by the consent of the two parties, it being understood that on the part of the United States any such action will be by and with the advice and consent of the Senate, and on the part of His Majesty's Government with the consent of the Governor-General in Council.

Shortly after the conclusion of the treaty Sir Wilfrid Laurier (then Prime Minister of Canada) in an after-dinner speech referred to it as follows :

> It has long been the desire, if I mistake not, of the Canadian people that we should be entrusted with the negotiation of our own treaties, especially in regard to commerce. Well, this looked-for reform has come to be a living reality. Without revolution, without any breaking of the old traditions, without any impairment of our allegiance, the time has come when Canadian interests are entrusted to Canadians, and just within the last week a treaty has been concluded with France—a treaty which appeals to Canadians alone, and which has been negotiated by Canadians alone.

Mr. Balfour said in the House of Commons in 1910, with reference to Canada's negotiations with France :

> The Dominion of Canada, technically, I suppose, it may be said, carried on their negotiations with the knowledge of His Majesty's representative, but it was a purely technical knowledge. I do not believe that His

[1] For a further account of the Commission and its work see "The International Joint Commission," by Lawrence J. Burpee, *Journal of Comparative Legislation*, vol. xv. p. 5.

Majesty's Government was ever consulted at a single stage of those negotiations. I do not believe they ever informed themselves, or offered any opinion, as to what was the best policy for Canada under the circumstances. I think they were well advised. But how great is the change and how inevitable! It is a matter of common knowledge—and, may I add, not a matter of regret but a matter of pride and rejoicing—that the great Dominions beyond the seas are becoming great nations in themselves.

In 1910 the Canadian Government and United States Government arranged for reciprocal trade direct, and a so-called Pact or Agreement was reached, subject to action by both legislative bodies.

**The Position of the British Ambassador at Washington.**—In 1911 the British Government was questioned as to the part played by the British Ambassador at Washington in connection with Canada's reciprocity negotiations—the complaint being that British interests had not been sufficiently safeguarded. In reply Mr. Asquith said :

The question of what is most to the advantage of Canada is primarily one for the Canadian Government. I must in view of these questions take the opportunity of repudiating emphatically the reflection on Mr. Bryce which is contained in them. Mr. Bryce had nothing to do with the views or policy of the Canadian Government. The negotiations were initiated and carried on by Canada, and the British Ambassador in pursuance of his plain duty when he saw William S. Fielding, the then Finance Minister of Canada, from time to time during the conferences at Washington in order to learn anything that might be needful for him to know. He did not interfere with the conference, but if asked for advice gave it, and all British subjects engaged in legitimate and important business are entitled to receive that from a British ambassador. For Mr. Bryce to have interfered with the negotiations going on at Washington upon matters which were within Canada's own competence would have been naturally resented by Canada. Generally there had been no difference of opinion in the Dominion about that, whatever may be the differences between Canadians themselves regarding reciprocity. The manner in which Mr. Bryce has performed his duties has been of great advantage, inspiring Canada with confidence in the British Ambassador at Washington, who will always be prepared to support the present Canadian Government no less than its predecessors in any negotiations it may be engaged in with the United States.

**The Present Position.**—To recapitulate, Canada has established a special department of her Government to deal with external

affairs, and the first report of the "Under-Secretary of State for External Affairs" has been issued, in which we find:

Canada negotiated with France the convention of September 19, 1907, and modified it by the subsequent convention of January 23, 1909.

Canada agreed (1908) with the United States upon joint regulations for the preservation and propagation of food fishes in waters contiguous to the boundary.

Canada arranged a treaty (1908) with the United States for the precise delimitation of the international boundary from the Atlantic to the Pacific.

Canada arranged with Germany a cessation of the tariff-war between the two countries (effective March 1, 1910).

Canada arranged an agreement with Italy (Canadian Order in Council, June 7, 1910), and proposes a more formal treaty.

Canada has had negotiations with Belgium and the Netherlands, and has given to those countries the benefit of the intermediate tariff (June 7, 1910).

Canada made arrangements (1910) with the United States, and in consequence obtained the benefit of the minimum tariff of that country. And more recently Canada negotiated with the United States an arrangement for the reciprocal reduction of tariff duties upon a large list of products.

Canada made a treaty with the United States (1910) with reference to boundary waters.

Canada is carrying on harmonious survey work with the United States in order to settle the boundary line along the 141st meridian of west longitude.

We should therefore read in the light of the above record the circular despatch of 1895 from the Secretary of State to the Governor-General of Canada, the Governors of the Australasian Colonies (except Western Australia) and the Governor of the Cape of Good Hope, wherein is set forth the procedure to be followed in the case of arrangements concerning trade matters, and this is said to be indicated in the language of Sir Henry Wrixon when he said at the Colonial Conference held at Ottawa in June 1895:

I understand that when occasion arises the dependency informs the Imperial Government of its desire to enter into certain arrangements. The Imperial Government authorises its Minister at the Court of the

power which is to be treated with to carry on that negotiation, and then technically it is the Empire which makes the treaty.

The despatch continues as follows:

*Par.* 7: To give the Colonies the power of negotiating treaties for themselves without reference to Her Majesty's Government would be to give them an international status as separate sovereign States, and would be equivalent to breaking up the Empire into a number of independent States, a result which Her Majesty's Government are satisfied would be injurious equally to the Colonies and to the Mother Country, and would be desired by neither.

The negotiation, then, being between Her Majesty and the Sovereign of the foreign State must be conducted by Her Majesty's representative at the Court of the foreign power, who would keep Her Majesty's Government informed of the progress of the discussion, and seek instructions from them as necessity arose.

It could hardly be expected, however, that he would be sufficiently cognisant of the circumstances and wishes of the Colony to enable him to conduct the negotiation satisfactorily alone, and it would be desirable generally, therefore, that he should have the assistance, either as a second Plenipotentiary or in a subordinate capacity, as Her Majesty's Government think the circumstances require, of a delegate appointed by the colonial Government.

If, as a result of the negotiations, any arrangement is arrived at it must be approved by Her Majesty's Government and by the colonial Government, and also by the colonial Legislature if it involves legislative action, before the ratifications can be exchanged.

*Par.* 8: The same considerations which dictate the procedure to be followed have also dictated the conditions under which, though never distinctly formulated, Her Majesty's Government have hitherto conducted such negotiations, and as to the propriety of which they are confident that no question can be raised.

*Par.* 9: These considerations are: The strict observance of international obligations, and the preservation of the unity of the Empire.

Australians and Canadians are with reason conscious to-day of the value to the Empire of a consolidation of strength which the present war has so largely brought about. With the colonial population increasing by leaps and bounds there must be provision for their voice in order to maintain the Empire.

We are now face to face with a reasonable demand not as yet formulated that the Dominions must be called to council if peace or war be involved.

If treaties can be effective between foreign powers, the Dominions and the Motherland can easily arrange a basis for mutual defence while maintaining all the essential features of self-government. There remains, however, the important question of war or peace on the part of the Empire. Who in future shall decide?

Fortunately for the real unity of the Empire, the Dominions, as we have seen, are practically independent States in trade matters to-day, but under a common Sovereign. Their steady growth and increasing strength call, and will more loudly call, for proper representation in the council of war. The earnest desire of the Dominions is to remain ever under the Sovereign of the Empire. Some system of representation should, however, be devised, while preserving the rights of self-government in matters of local concern, yet securing consolidation and permanency of the naval and military strength, so as to ensure the laws and liberty of this growing Empire.

"All must be false that thwarts this one great aim."

# CHINESE PARTNERSHIPS IN HONG-KONG.

[*Contributed by* C. GRENVILLE ALABASTER, ESQ.]

WHEN Hong-Kong was first occupied by the British it was scantily populated. Such Chinese as were found there were poor fisherfolk and agriculturists, and the customs that obtained among them were of small moment. Nevertheless they were recognised in the Proclamation issued to the inhabitants and in the warrant of the first chief magistrate, who was authorised and required "to exercise authority according to the laws, customs, and usages of China, as near as may be (every description of torture excepted) . . . over all the native inhabitants."

Two years afterwards, on April 5, 1843, the Colony obtained a local Legislature. One of its first acts was to pass an enactment, now appearing re-enacted as s. 5 of the Supreme Court Ordinance, 1873, by which it is provided that such of the laws of England as existed when the Colony obtained a local Legislature should be in force in the Colony "except so far as the said laws are inapplicable to the local circumstances of the Colony, or of its inhabitants, and except so far as they have been modified by laws passed by the said Legislature."

**Chinese Commercial Interests.**—The growth and progress of the Colony as a transhipment port and distributing centre for the trade of Southern China have been accompanied by an influx of Chinese of all grades, and among them many of the merchant class for which Southern China is so famous. Their numbers have been out of all proportion to those of immigrants from other countries. The census returns, taken in May 1911, give 444,664 Chinese, and 12,075 non-Chinese; and if we exclude the Army and Navy, the European population consists of barely 6,000 souls.

It is only natural that, coming in such numbers, they have brought with them their customs of trade and family life as well as their customs of thought. In so far as partnership is concerned,

these customs differ in many important respects from the partnership law of western nations.

The chief characteristics of English partnership law may be stated to be the unlimited liability of the private estate of each partner for the debts of the firm, the dissolution of the partnership upon the death or bankruptcy of any partner, and the limit to the number of partners.

**Limitation of Liability of Partners.**—With the Chinese, however, each partner is liable to pay out of his private property only such proportion of a partnership debt as his share bears to the total of the shares of all the partners. So that in the case of an insolvent firm a creditor must sue all the partners if he wishes to recover his whole debt. If he sues less than all he only recovers a part of it; but in any case his position is better than that of the creditor of an insolvent limited company, who cannot reach the private property of individual fully paid shareholders at all. In this respect a Chinese partnership lies in a position midway between the limited liability imposed by our company law and the unlimited liability imposed by our law of partnership; but it has no analogy with the French system of *associations en commandité*, which also lies between our two extremes, and which provides for a general partner responsible for all the debts of the firm and limited partners without such grave responsibility. It is based, like our company law and like the French system (now also British by virtue of the provisions of the Limited Partnerships Act), on sound principles of commercial necessity. Indeed it speaks much for the soundness of Chinese commercial customary law that it should provide in this way for the encouragement of trade by lessening the liability of those who embark capital in commercial enterprises.

**Duration of Partnerships.**—Another characteristic of Chinese partnerships is that they do not come to an end on the death of a partner. Administration and executorship have no place in Chinese law. *Le mort saisit le vif*, and so on the death of a partner his sons become partners in his place. In some cases a new partnership agreement is drawn up in which the sons are named as partners, in others the share remains intact under the father's *t'ong* name; the sons sharing the interest which is paid to the *t'ong*. A *t'ong* name is a name in which property is held, and thus differs from a firm or *hong* name, the style under which a business is conducted.

The latter we are all familiar with, but the former is a peculiarly Chinese institution. As with us "Smith and Jones" may represent, as a trade name, a single individual or a dozen persons associated for the purpose of trade, so with them the Wing Shing T'ong may represent one man or a number of descendants of one man in whose property each has an interest, though the property itself remains undivided. Every Chinese adult owning property has a son or sons to succeed him and to carry on the ancestral worship. Should his wife be childless his concubines may be more fortunate, and even where they fail a legitimate son is acquired by adoption. Indeed adoption is made posthumously where he has been so neglectful as not to provide himself with a son in his life-time. Thus it is that Chinese partnerships do not come to an end on the death of a partner.

**The T'ong Name.**—There is no limit to the number of *T'ong* names a Chinese may adopt. If he chooses he may have a different one for each property he possesses. They are not in any sense personal names or surnames. *T'ong* means hall, and the three words which go to form a *t'ong* name are descriptive of a hall or temple. Thus "hall of great prosperity" would in its Chinese rendering afford a suitable *t'ong* name for the holder of property. These names are generally selected by the purchaser of property at the time of purchase and remain attached to the property as it descends until it is finally divided. Again there is nothing in Chinese law to compel the owner of property to adopt or use a *t'ong* name. He can use his own personal name or any of his many personal names, and frequently does so. It is not easy to assign a reason for a single individual holding a dozen properties in as many different names, unless it be that the prudent and far-seeing trader anticipates a time when his property may be declared forfeited by the authorities, and hopes by covering up his tracks to save at least some part of it for his descendants, or unless he fears that too great a parade of his wealth may make it difficult for him to evade the importunities of his poor relations.

It frequently happens too that firms in their associated capacity take shares in other business firms and hold these shares under their collective firm name. This practice is not, however, peculiar to the Chinese,[1] though in their case there is no restriction as to the total number of partners who may legally join in a partnership.

[1] See *Warner* v. *Smith*, 32 L.J. Ch. 573.

**Finances of Partnerships.**—According to Chinese ideas the capital advanced by partners is treated as a loan to the firm which bears interest, usually at the rate of 10 per cent. per annum. Consequently a firm is not regarded as prospering or as on a dividend-paying basis until it can pay more than this 10 per cent. Most Chinese firms also take loans on deposit from outsiders. These deposits also bear interest, but the depositors differ from the original subscribers or partners in that their return is limited to the agreed interest on their deposits, which are withdrawable on call, and in that they are, like the depositors in a bank, mere creditors of the firm in which they have deposited their money. Another feature of Chinese partnership is the *hung ku* or red share. This is generally given to the manager of the firm as a sort of bonus share. It represents no capital, so the holder of it gets no interest on capital, but after the interest on capital has been paid, he ranks *pari passu* with the other partners in the distribution of surplus profits.

The ordinary balance sheet of a Chinese firm which is doing well usually provides first for the payment of interest to depositors, next for the payment of interest on capital subscribed by partners, then for a staff bonus (usually 10 per cent. of the surplus) to the employees as an encouragement and reward for industry, and finally for the distribution of the remainder of the profit between the *hung ku* shareholder and the other partners. If a partner or red shareholder does not desire to draw the whole of his profits, he leaves the undrawn portion as a deposit bearing interest. If the firm fails the red shareholder is under no personal liability to the creditors, and, as has been stated in a previous paragraph, the liability of the other partners is limited.

**English Law inapplicable to Chinese Customs.**—It will thus be seen that, while Chinese partnership custom differs in many respects from that of western nations, it is definite in its peculiarities, and is in no sense repugnant to the root principles of commercial integrity. Up to the time of the passing of the Partnership Ordinance, 1897, it was always considered, though the question was not raised in the Courts, that the English common law relating to partnership was in force in Hong-Kong by virtue of the provisions of the Supreme Court Ordinance. Although the Chinese customary law was different in so many of its characteristics, it was argued, not unreasonably, that the English common law could not be held "inapplicable to

the local circumstances of the Colony or of its inhabitants." This specious argument did not, however, find favour among the Chinese community, who continued to regard themselves as bound by their own customs and who adopted every method which ingenuity could suggest to evade the obligations of the foreign law. Their outward complaint was mainly directed against what they considered the unfairness of a law which imposed unlimited liability on individual partners; but probably they objected as much to the payment of probate duties and the taking of accounts when partners died.

**Movements towards Legislative Reform.**—In the year 1874 the Chinese community twice petitioned the Government for a Bill to register Chinese partnerships. A Bill was accordingly drafted by the Attorney-General, and was published for the information of the public, but the Government, considering it doubtful whether the measure would have carried out the objects at which it aimed, declined to submit the draft to the Legislative Council. It appears to have been the view of the Government of the time that, having regard to the fact that many partners in every Chinese firm reside out of the jurisdiction of the Courts, it was impracticable to impose provisions which would so limit the remedies of creditors.

In 1877 and 1878 the Chamber of Commerce in its turn petitioned the Government to make it compulsory that members of Chinese firms should be registered; but the Governor refused to proceed with the Bill on the ground that he had been advised by certain Chinese whom he had consulted "that the Chinese system of trading would be completely upset by it," yet in 1882 the Chinese community presented a petition signed by sixty-eight well-known Chinese and 104 Chinese business firms calling attention to the evils "arising from the want of a system or registration of Chinese partners." Nothing was done, however, as the Registrar-General of Chinese (now called the Secretary for Chinese Affairs) was of opinion that the petition in favour of registration had been prepared in a panic arising from heavy losses in land speculation. Nothing more was heard of the subject till 1891, when the matter was brought up by the Chamber of Commerce in the form of a recommendation in connection with the Bankruptcy Bill. The Chamber expressed the opinion that to render the Bill more completely applicable to local requirements it should be supplemented

by a bill making compulsory the registration of individual members of Chinese firms trading in the Colony. At that time the Government of the Straits Settlements were engaged in the discussion of a Bill with somewhat similar objects, and it was thought advisable to await the result of their deliberations, which lasted until the year 1896, when the abortive Bill was dropped in the Singapore Legislative Council. In that year the Partnership Bill (now the Partnership Ordinance, No. 1 of 1897) was introduced into the Legislative Council. In his speech on the second reading the Attorney-General said: "The object of this Ordinance is to introduce into this Colony the provisions of the Imperial Partnership Act of 1890. That Act embodies a convenient and well-arranged digest of the principal rules of law relating to partnerships, and the Bill is almost entirely a transcript of its provisions, very slight modifications having been required to adapt it to the circumstances of the Colony."

**Adoption of English Partnership Act, 1890.**—As a matter of fact this Ordinance was the Partnership Act pure and simple, a mere codification of the English common law with no provisions as to registration and entirely ignoring Chinese partnership custom, though Chinese partnerships were bound, of course, by its provisions. Commenting on this enactment in a Chinese case [1] the Chief Justice said: "This is an Ordinance passed in 1897 by the local Legislature, and I can only hold, there being no reference from end to end to Chinese customs, that it was the deliberate intention to ignore the Chinese customs of partnership. Whether this was wise or unwise is not for me to say. But I must point out to the Government the extreme danger of reproducing English legislation bodily into the Colonial Statute Book without at least considering how it may affect the customs of the large body of Chinese who are legislated for."

In 1900 the Chamber of Commerce again took up the matter, and a committee was appointed to consider it. This committee reported that it was impracticable to give effect to legislation on the subject. As a result of this report the question was shelved for nearly a decade, and but for an accident would probably have remained shelved for a much longer period.

In 1909 the question of introducing into the Colony the provisions of the Limited Partnerships Act of 1907 was mooted, and

[1] 3 *Hong-Kong Law Reports* 170.

the writer prepared a draft Bill with that sole object in view. The Bill was printed and issued to various bodies, such as the Law Society and the Chamber of Commerce, for discussion prior to its introduction, and thus came into the hands of the Chinese Commercial Union. This body did not know that it was merely intended to bring into force the French system which had been recently introduced into England. Misled by the provisions as to registration, they regarded it as one more attempt to grapple with the question of their own partnership customs. Therefore they criticised it, and the Bill was dropped. But as a result of the question being thus re-opened the writer was asked by the Government to undertake the preparation of a fresh Bill which would deal with the whole question. Some time was spent on the collection of information as to the precise nature of the Chinese customs affecting partnership, and much assistance was afforded by the Registrar-General of Chinese, the Chinese members of the Legislative Council, and others, with the result that a Bill was produced which finally became law as the Chinese Partnerships Ordinance, No. 53 of 1911.

**The Partnerships Ordinance of 1911.**—For reasons of policy it was not thought desirable to make registration of partners compulsory. Compulsory registration might have had a disturbing effect on the trade of the Colony. The Ordinance therefore took the form of a bargain. Those who registered gained certain advantages in the recognition of their peculiar customs. Those who would not register were left, where they were before, under the unlimited liability imposed by the English law.

In its essential principles the measure differs from the Limited Partnerships Act, but that Act was used as a convenient model on which to frame the provisions as to registration. Being essentially an Ordinance for the recognition of Chinese custom it was not made general in its application. Only such firms "as in the opinion of the Registrar of Companies can properly be described as Chinese partnerships" may take advantage of its provisions. On the other hand the Limited Partnerships Ordinance, No. 18 of 1912, passed in the following year and based on 7 Ed. VII. c. 24, applies only to such partnerships as in the opinion of the Registrar "can properly be described as non-Chinese partnerships."

Most of the sixteen sections which comprise the Chinese Partnerships Ordinance are devoted to definitions and regulations as to

registration, mere machinery. The substantive law is given in ss. 4 to 7.

**4.** (1) No partnership may register under this Ordinance unless one at least of its partners registers as a partner therein.

(2) Firms or family *t'ongs* may be registered as partners in a registered partnership, provided that a firm or family *t'ong* so registered shall be regarded, so far as the partnership in which it is registered is concerned, as one person, and provided also that one partner only in the firm or one member only of the *t'ong* shall be registered as a representative of the firm or *t'ong* so registering as aforesaid, and provided also that no person may be registered as a representative of a firm or *t'ong* unless the Registrar of Companies is satisfied that he has the authority of the other members of his firm or the adult members of his *t'ong* to be registered as their representative in the registered partnership, and unless one month shall have elapsed since an announcement of his intention to apply for registration as a representative of the firm or *t'ong* in question shall have been published in the *Gazette* and in two Chinese daily newspapers circulating in the Colony.

(3) The Registrar of Companies shall register the names of all members of a family *t'ong* disclosed to him by such representative, including infants of any age ; and thereafter members so registered shall have their liability limited in the same manner as if they were registered as partners under this Ordinance.

(4) Bodies corporate may be registered as partners in a registered partnership.

**5.** (1) The liability of each partner in a registered partnership, which may sue and be sued in its registered name, shall be unlimited in respect of assets in his possession connected with the registered partnership.

(2) The liability of each unregistered partner in a registered partnership shall be unlimited.

(3) The liability of each registered partner in a registered partnership beyond his liability under sub-section (1) shall be limited to such proportion of the debts and obligations of the registered partnership as his interest in the registered partnership bears to the total interest of all the partners therein, whether registered or unregistered.

(4) Where a firm or family *t'ong* is registered as a partner in a registered partnership, but is not itself registered as a registered partnership, the liability of each of its partners or members shall be unlimited in respect of assets in his possession connected with the registered partnership, but his further liability shall be limited to such proportion of the debts and obligations of the registered partnership as the interest of his firm or *t'ong* in the registered partnership bears to the total interest of all the partners therein, whether registered or unregistered.

(5) Where a firm or family *t'ong* is registered as a partner in a registered partnership, and is itself also registered as a registered partnership, the liability of each of its registered partners or members shall be unlimited in respect of assets in his possession connected with the registered partnership in which his firm or *t'ong* is a registered partner, but his further liability shall be limited to such proportion of what would have been his total liability if his firm or *t'ong* had not itself been a registered partnership as his interest in his own firm or *t'ong* bears to the total interest of all the partners therein, whether registered or unregistered.

(6) Where a firm or family *t'ong* is registered as a partner in a registered partnership, and is itself also registered as a registered partnership, the liability of each of its unregistered partners or members shall be unlimited in respect of assets in his possession connected with the registered partnership in which the firm or *t'ong* is a registered partner, but his further liability shall be limited to such proportion of the debts and obligations of the registered partnership as the interest of his firm or *t'ong* in the registered partnership bears to the total interest of all the partners therein, whether registered or unregistered.

(7) No person registered only as a *hung ku* shareholder shall be under any further liability for the debts and obligations of the firm in which he is so registered than the liability imposed by sub-section (1).

(8) The burden of proving that assets in his possession are unconnected with the registered partnership shall be on the person who seeks to have his liability limited under this section.

(9) No member of a firm or family *t'ong* which is registered as a partner other than the registered representative thereof shall take part in the management of the business of the registered partnership, or shall have power to bind the registered partnership. Provided that any member of such firm or *t'ong* may by himself or his agent at any time inspect the books of the firm and examine into the state and prospects of the partnership business.

If a member of such firm or *t'ong* other than the registered representative thereof takes part in the management of the business of the registered partnership he shall be personally liable to an unlimited extent for all debts and obligations of the registered partnership incurred while he so takes part in the management thereof.

(10) A firm or family *t'ong* registered as a partner in a registered partnership may be sued in its firm or *t'ong* name in respect of the debts and obligations of the registered partnership, and service on its registered representative shall be deemed sufficient service on the partners in the firm or the members of the *t'ong*.

**6.** (1) A registered partnership shall not be dissolved by the death, or bankruptcy, or admission, or succession, or retirement of a partner; and the lunacy of a partner shall not be a ground for dissolution of the partner-

ship by the Court, unless the lunatic's share cannot be otherwise ascertained and realised.

(2) In the event of the dissolution of a registered partnership its affairs shall be wound up by the partners unless the Court otherwise orders.

(3) Applications to the Court to wind up a registered partnership shall be by petition under the Companies Ordinance, 1911, and the provisions of such Ordinance relating to the winding up of companies by the Court, and of the rules made thereunder (including provisions as to fees), shall, subject to such modification (if any) as the Governor in Council may by rules provide, apply to the winding up by the Court of registered partnerships, with the substitution of partners for directors.

(4) Subject to any express agreement between the partners—

(*a*) any difference arising as to ordinary matters connected with the business of a registered partnership may be decided by a majority of the partners;

(*b*) a partner shall not be entitled to dissolve a registered partnership by notice.

**7.** Subject to the provisions of this Ordinance, the Partnership Ordinance, 1897, and the rules of equity and of common law applicable to partnerships, except in so far as they are inconsistent with the express provisions of the last mentioned Ordinance, shall apply to partnerships and partners registered under this Ordinance.

**Neglect of the Ordinance.**—It would seem that the object of the representatives of the Chinese who had worked so patiently and persistently to get this Ordinance passed was to score a moral victory by getting statutory recognition of their partnership customs. Once the Ordinance had become law, that object was attained. Whether the Ordinance was used or not was, the Chinese considered, merely a question for the individual to determine. The Chinese individual shares with the English income-tax payer a deep-rooted dislike to filling up inquisitorial forms demanding information as to what he naturally considers to be his private affairs, and so he has been slow to avail himself of the advantages afforded by voluntary registration. The ordinary Chinese trader is satisfied that the law of the Colony will recognise his customs if and when he wishes it, but he is careful not to give expression to that wish until he is satisfied that it will be to his personal advantage to do so. On this latter question he is very doubtful. On the one hand, if the firm is not prosperous he will reduce his liability by registration; on the other hand, thanks to the anonymity of the *t'ong* names in

which he holds his shares, he can often dodge the collector of death duties by resisting the temptation to register. Another reason which may be advanced for the slowness of the public to avail themselves of the Ordinance is that the stagnation of trade since 1911 has not conduced to the formation of new commercial enterprises among the Chinese. In 1911 there was the first Revolution and the overthrow of the Manchus; in 1913 the second Revolution and the ascendancy of the North; in 1914 the outbreak of the Great War, still unconcluded; in 1915 the Monarchical Movement and the secession of the southern provinces. Finally, as these words are being penned in July 1916, Canton, the capital of the neighbouring province, is invested by three revolutionary armies who have cut off all railway and telegraphic communication. It may be that the inducement which the Ordinance offers is not sufficiently high and more will have to be offered. It may be merely that the Chinese are too conservative to move in any direction as quickly as westerners would consider desirable. Time will show.

# THE PRIVY COUNCIL AND PROBLEMS OF CLOSER UNION OF THE EMPIRE.

[*Contributed by* ARTHUR P. POLEY, ESQ., B.A.]

THE three works[1] which constitute the basis of this article are produced by authors of distinction well qualified from experience and study to discuss the future government of the British Empire. Professor Keith is widely known as the author of *Responsible Government in the Dominions*—a standard authority. His former position at the Colonial Office has also brought him into the closest touch with Imperial problems, so that his views are not merely academic. They are set out in his new book entitled *Imperial Unity and the Dominions*. Mr. Lionel Curtis, whose brilliant administrative work in South Africa is widely known, assumes the responsibility for the views expressed in the work *The Problems of the Commonwealth*. Mr. Basil Worsfold is also an author of experience, and he, like Mr. Curtis, can claim some special knowledge of South African conditions. To his work *The Empire on the Anvil*, which by way of sub-title he calls "Suggestions and Data for the future Government of the British Empire," Lord Sydenham has contributed a preface. Lord Sydenham states that—

> the constructive proposals which occupy a large portion of Mr. Worsfold's book will appeal to his readers not as attractive theories, but as thoughtful contributions to the solution of problems which have now become real and urgent.

[1] *Imperial Unity and the Dominions*. By Professor A. B. Keith, D.C.L., D.Litt., of the Inner Temple, Barrister-at-Law, Regius Professor of Sanskrit and Comparative Philology at the University of Edinburgh, formerly of the Colonial Office. (Oxford: at the Clarendon Press, 1916.)

*The Problem of the Commonwealth*. By Lionel Curtis. (Macmillan & Co., London, Bombay, Calcutta, Madras, Melbourne. The Macmillan Co. of Canada, Toronto, 1916.)

*The Empire on the Anvil*. Being Suggestions and Data for the future Government of the British Empire. By W. Basil Worsfold, with a preface by Lord Sydenham of Combe, G.C.S.I., G.C.M.G., G.C.I.E., F.R.S. (London: Smith, Elder & Co., 15, Waterloo Place, S.W., 1916.)

**The Extent of the Problem.**—Most readers of these works will peruse them with a view to discover the nature of the constructive proposals which their authors make for the future government of the Empire and the reasonings by which they support them. The problem of future union is one of transcendent importance. How great it is Mr. Basil Worsfold clearly shows by the data he has given. At the outbreak of the war, on the basis of the returns for the year 1913, the British Empire had an area of 11,273,000 square miles and a population of 417,268,000, being respectively one-fifth of the total area of the world and one-fourth of the total population of the world. It contained a population of all races, inhabiting lands under all varieties of climates, with no common language yet nevertheless united under one sovereign head. Whilst the United Kingdom contained the comparatively small area of 121,142 square miles, the five self-governing Dominions of Canada, Australia, South Africa, New Zealand, and Newfoundland occupied 7,324,914 square miles. India with its 1,802,112 and the Crown Colonies and Protectorates in Europe, Asia, Africa, and America with their 2,024,832 made up the grand total of 11,273,000 square miles. The population on the basis of the statistics for 1911 showed a very disproportionate distribution. The United Kingdom was inhabited by 45,221,615 inhabitants, the self-governing Dominions including only the white population of South Africa by 14,177,223, India by 315,086,372 and the Crown Colonies and Protectorates by 42,782,777. In all this vast Empire there was only one state possessing the full attributes of sovereignty—the United Kingdom. Its Cabinet chosen from out of the ranks of its Parliament elected by the electors of the United Kingdom was able to tender that constitutional advice to the sovereign which made the whole Empire at war or proclaimed it at peace.

The practical problems which confront the framers of any form of federation are many. Not only are there intervening oceans and immense distances which divide one portion of the Empire from the other, but different types of people, stages of civilisation, and forms of government. Moreover, it is a striking fact that out of its huge population the Empire only contains about 64,000,000 of white people of British or European descent. Another remarkable fact is that the white people are centered mainly in the United Kingdom and the self-governing Dominions, whilst the rest, an appre-

ciable minority, are scattered through India and other parts of the Empire. Is it possible then to form any federal Empire with a federal legislature? If so, can it be constructed on a democratic representative basis? Mr. Basil Worsfold asks and answers the questions negatively: whilst thinking it not practicable at the present it may be in the future.

> In a central legislature for the British Empire (he says) the principle of one vote one value could not be applied. The differences of race and civilisation in its various peoples may and probably will make it impracticable for the present and for many years to come to grant to the native races of India, Egypt, South and Central Africa, and the West Indies the right of electing persons of their own race to represent them in the Lower House of the central legislature.

He considers, however, that in respect of the Upper House the position would be different:

> Here the component states (or provinces) would be represented as states and it would be for the respective Governments of the several states to determine in each case the methods by which the seats assigned to them were to be filled up.

**A Dominion Council of Delegates.**—Mr. Worsfold favours a federal legislature, but suggests as a halfway house annual meetings of the Imperial Conference to which representatives of the Governments of India, the lesser Colonies and the Protectorates should be admitted, with a similar alteration in the representative character of the Imperial Defence Committee. His most original suggestion is that a Dominion Council of Delegates elected for three years by the several Dominion legislatures on some agreed basis should meet once a year in London. Ministers of the Imperial Government might attend and take part in its proceedings, but without the right to vote. Its object would be to ensure some control over the cost of the Imperial services, by adjusting the amounts of the annual contributions payable for these by the Dominions. In holding or withholding contributions, which the delegates would be empowered to do, they would hear and consider statements from one or more of the Imperial Ministers upon foreign affairs, questions of defence, and financial and other matters relating to the Empire as a whole. and if further information were required they could make representations to the appropriate Imperial Ministers or to Parliament,

or both, as might be determined. The money which the Council would deal with would be the sums which the Dominions had agreed upon for a period of ten years to contribute proportionately to their populations upon a fixed basis of assessment to the annual cost of the Imperial services. The scheme proposes that the delegates must be first chosen before the Dominions agree to vote the money, Before, however, the appropriations for the Dominions were voted upon by the Dominion Parliament they must be submitted to and approved by this Council of Delegates.

It is not stated what would be the action of the delegates should the Dominions not agree to contribute for ten years or what they would do if, when they had disapproved of the proposed appropriations, the Dominion Parliaments refused to alter them, nor does Mr. Worsfold mention what would happen if the Imperial Ministers declined to attend the meeting of the delegates and to submit themselves to cross-examination. Whether the Dominions would ever allow a body such as this to veto their estimates seems improbable, but it is more improbable still to think that any Council with any such powers would ever be elected. The business of the Council would be—

> to exercise the power of the purse and in this way enable the Dominions to exert direct influence upon the administration of the War Office and the Admiralty, and to secure an attentive hearing for any representations which the Council itself might make to the Imperial Government on questions of foreign policy and inter-Imperial commerce.

The claim is made that the operation of such a Council would effectively prepare the electors and legislators of both the United Kingdom and the Dominions for the direct commingling of home and oversea British in the work of Imperial administration. Mr. Worsfold introduces a revolutionary suggestion, perhaps influenced by the fact that the English House of Commons gradually established its authority over the executive by controlling supplies: anyhow he proceeds to adopt this precedent.

**Objections to Federation.**—Professor Keith makes a number of suggestions: the abandonment of all control over Dominion legislation by reservation and disallowance; the removal of all restrictions on the powers of Dominion Parliaments to regulate merchant shipping; the formation of an Imperial Court of Appeal

by transferring appeals at present brought to the House of Lords to the Judicial Committee; continuous and effective representation of the Dominions on the Committee, and representation by the Dominions at International Conferences. Frequent visits of Dominion Ministers are also recommended, and the residence when possible of a Dominion Minister in London with the duty of keeping his Government informed on foreign policy, with a share as far as possible in its control, although he does not explain how this is to be effected. The other proposals refer to the status of the Governors-General and Governors, and to British Indian subjects legitimately resident in the Dominions. His claim is that his suggestions are simple and practical extensions of principles already in operation and for that reason not exposed to the grave political and commercial difficulties attendant upon any scheme of federation or commercial union. Of Imperial federation he writes pessimistically:

> I yield to no one (he says) in the splendid and legitimate ideal of bringing about a true Union of the Empire, but I have as little faith in the possibility of its consummation at an early date as I have in the future of schemes for the permanent pacification of Europe or the effective control of foreign policy by the democracy.

Professor Keith in other portions of his work discusses federation. He frankly states that the alternatives are—either the Dominions must become independent for purposes of international law, as they cannot remain indefinitely in the humiliating position of dependencies without a share in foreign policy, or means must be found of associating them in the control of the Empire, which falls short of federation, or the refusal of Imperial Government to share responsibility cannot be persisted in.

In discussing the alternative to the independence of the Dominions he does not suggest that independence would mean separation but an alliance of kingdoms under the same monarch. The case for and against separation mainly centres round the arguments adduced by that able Canadian, Mr. J. S. Ewart. But with the tendency at present so strongly displayed throughout the Dominions for closer union, existing anomalies need not be grounds for separation. To recognise the difficulty of the position and to despair of a solution are very different things. Whilst recognising Mr. Ewart's position Professor Keith controverts and dissociates himself from it.

Lastly the important question of Imperial partnership is treated.

The chief claim (he says) which the solution of the independence of the Dominions as ending the complications of the present relations of the Empire can make is that it would be simple. It would be effected by nothing more than a treaty and an Imperial Act ratifying that treaty. . . . It is a much more difficult thing to devise some plan by which the Dominions may retain their autonomy, but yet may be associated in Imperial policy and play their part in Imperial defence.

The whole of Professor Keith's work requires careful study by all who take any interest in the framing of a constitution for the Empire. It is important, however, to note that he agrees with Mr. Worsfold in thinking a federal Parliament impracticable, and like him he only makes suggestions, of which one—the stationing of a permanent Minister in London to confer with the Colonial Secretary and the Imperial Ministers—has already been rejected by some of the Dominions.

**A Federal Parliament.**—Mr. Lionel Curtis, the third of the three writers, is a brilliant advocate of a federal Parliament. In his *Problem of the Commonwealth* he propounds a scheme for a federal legislature with a federal executive. Unlike Mr. Worsfold, he provides no representation in his legislature for India or Egypt or for any portion of the Empire outside the Self-Governing Dominions. On the question of the dependencies he states that thought in the Empire is not in unison. In England those who advocate self-government for India are numerous, but their influence is qualified by a sense of responsibility. In the Dominions they are more numerous, but " if India, Egypt, and the African dependencies must be governed from outside, the responsibility, they would say, must be left where it now rests, with the people of the British Isles." Mr. Curtis rejects the idea of leaving these dependencies to govern themselves or the idea of leaving their affairs to be conducted by the United Kingdom. He considers that the latter is a no more practicable alternative than the former. His reason is that since Britain cannot govern India and Egypt without armies, and the control of armies must be a federal power, their control naturally falls to the federal authority. Moreover, as their size and position and that of the African territories are such as to involve any power governing them in delicate relations with foreign powers, and as their internal affairs, as well as those of the African territories,

are inseparably connected with foreign affairs and the functions of the Colonial Office, they must be controlled by these offices, which in future must be federal ministries. The moral consideration which he adduces is the spiritual end for which the Commonwealth exists. "The task of preparing for freedom races which cannot govern themselves" is the supreme duty of those who can, and this must necessarily be assumed by all the self-governing Dominions.

To the federal Parliament Mr. Curtis assigns the Foreign, Admiralty, War, Munitions, India, and Colonial Offices, with a Ministry of Imperial Finance. With reference to taxation, he says the final right to determine the quantity of the taxation to be raised in the Empire must rest with the federal Government, although the power of determining its quality must remain where it is, but subject to the federal power to distrain for it on the individual taxpaper. His federal Parliament would not deal with tariffs nor with immigration. He considers these are national as distinguished from federal powers. No statement is made as to whether the legislature is to consist of one or two chambers and no scheme or representation is set out. Mr. Worsfold is bolder: on the basis of the estimated population of the Empire, he suggests a House of Representatives of 400 members, 100 of whom are to be assigned to the coloured states, 222 to the states of the British Isles, 40 to Canada, 23 to Australia, 5 to New Zealand, 6 to South Africa (white population), 1 to Newfoundland, and 3 to other white British groups. His Senate consists of 200 members, 90 from the states of the British Isles, 17 from Canada, 13 from Australia, 9 from New Zealand, 9 from South Africa (white population), 3 from Newfoundland, 9 from other white British groups, and 50 from the coloured states. Should the coloured population be excluded, as Mr. Curtis contends, whatever basis be adopted, any representation based on population would assure Great Britain an overwhelming preponderance in the Federal Houses.

**Power of Taxation.**—Mr. Curtis is sound as to one point in insisting that in the ultimate resort any Federal Government must have the right of distraining for its taxes on the individual taxpayer. A power to tax without a power to levy a tax is useless. The Confederation of the United States possessed the power to levy. It could fix the quantity and direct each State to pay its share, but it was helpless when the States, as they did, neglected or refused to

pay. The federalist strongly insisted upon the necessity of a direct power to levy. Is Mr. Curtis equally sound when he allots to the federal authority the right to fix the quantity and to the States to fix the quality? Supposing that the States should refuse to fix the quality? Would he then suggest that the federal Parliament should determine this, and distrain on the objecting States? If not, by what process could federal taxation be obtained? The early Confederation of the United States was admittedly a failure, and in no particular was this more evident than in the weakness of its taxing powers.

> Without the possession of a great power of taxation (writes Dr. Story in his treatise on the Constitution), the Constitution would long since, like the federation, have dwindled down to an empty pageant. It would have become an unreal mockery deluding our hopes and exciting our fear. It would have flitted before us for a moment with a pale ineffectual light and then have departed for ever to the land of shadows.

Is Mr. Curtis's proposal then an improvement on that which existed in the American federation which he so properly condemns? Probably not; for even granted a continuance of the best of goodwill throughout the British Empire for all time, increases of tariffs are popular means of raising money, frequently resorted to. What would prevent the Dominions then from raising their revenue to provide their quotas fixed by the federal legislature for Imperial defence by increasing tariffs against British goods or by diminishing existing preferences? Reasons would be plausible and increases of tariffs might not lack the influential support of the manufacturing classes.

But it might be argued that such a danger as this would be obviated by defining the quality of the taxation which the states of the federation could impose for defence. For instance, an express prohibition might be directed against raising it by customs duties. If a federal land tax throughout the Empire was considered impracticable, a federal income tax might be possible. Its possibility may be admitted, but its propriety would be questionable. In Australia it would intrude upon both State and Commonwealth spheres of taxation, perpetuating a triple income tax, and by reason of the Imperial federal Parliament's power to distrain upon the individual taxpayer, additional costs of collection. Any federal taxation which is based on customs duties is moreover

inextricably interwoven with the exercise of a commerce power, which Mr. Curtis declares is not to be a federal power exercised by the legislature.

**Control of Foreign Policy.**—To control foreign policy, moreover, implies something further than mere direction; it includes as one of its incidents the making of treaties with foreign nations. It is found by experience that treaties, even those which ostensibly provide for offence and defence, are based on the commercial and economic considerations of the contracting nations. In what position then would a Foreign Secretary to a federal Parliament be who, when asked to agree to a treaty with a foreign power, was obliged to admit that the constitution had given him no power to deal with questions of commerce and that these must be settled with the states of the federation?

To take a recent instance, could a federal executive without possessing a commerce power have sanctioned or ratified the resolutions arrived at at the Paris Economic Conference? Yet it is admitted that the commercial policy embodied in these resolutions was a legitimate method of warfare. In any federal Government a sovereign power of peace and war and the consequent control of foreign policy cannot be divorced from the commerce power, and these powers cannot be under two or more authorities.

To frame a federal legislature limited to controlling foreign policy and the issues of peace and war and to govern the dependencies would mean the construction of an imperfect agency of Government unless it were equipped with many other great powers. A Government controlling peace and war must have power to control trade and commerce, shipping, navigation, railways and means of communication, cables and telegraphs, currency, the issue of paper money, census and statistics, aliens and naturalisation. The statement is not a matter of hypothesis, for all these powers have been exercised during the present war. A Government which in addition controls the dependencies must regulate the terms of their intercourse with other parts of the Empire. The proposers of a federal Parliament are apparently then in this dilemma; they must either fashion an imperfect agency of government, or else they must equip it with sufficient powers for the purpose for which it was created. If they equip it with sufficient powers they cannot do so without destroying the Dominion and Commonwealth Governments.

It is then idle to suggest that a federal legislature could be established without interfering with the autonomy of the Dominions, since the powers which must be assigned to a Government controlling peace are the powers which the Dominion of Canada and the Commonwealth of Australia now exercise, and there could not be concurrent powers exercised by national and Imperial authorities. Framers of federal constitutions have federated states, but they have never dealt with the question of federating existing federations. Any proposals, however, for a federal legislature involve other considerations of a political nature. There is a question of the usefulness of such a body to the Empire. Military and naval affairs demand the special knowledge and administrative abilities of experts, and civilians must necessarily be guided by their views. Foreign affairs are matters of confidential negotiations, and only at certain times are they ripe for open discussion. There are ways, however, by which a legislature can be apprised of the course of affairs. The democracy of the United States has solved the nice problem of a too great publicity and a too little by the institution of a Committee of Foreign Relations which is in close touch with the executive. The gain to the executive by the institution of such a committee consists in the protection it affords it against charges of undue secrecy in the conduct of foreign affairs. By reason of the confidence the Legislature imposes on its own committee the less likely is it to interfere with the discretion of the executive in fixing times for open pronouncement and discussion. The executive is in addition strengthened by an assurance of legislative support when the occasion demands it and the democracy satisfied by the trust the executive bestows upon the legislature. To keep the people of the Empire in touch with foreign affairs, however, would not necessitate the establishment of a federal legislature. If the Cabinets of the Dominions were acquainted, as they might be, with every phase of critical negotiations with a foreign power, they could by the institution of committees of foreign relations impart such necessary information as would satisfy their Parliaments.

**The Business of a Federal Legislature.**—But what would be the nature of business that would occupy the time of a federal Parliament such as Mr. Curtis and others who are advocating a federal legislature propose? To fix the quotas of the money to be paid by

each state of the federation to the federal executive, to deal with its allocation? Would not common courtesy suggest that Canadian members, for instance, should refrain from interfering with its expenditure in Australia, in South Africa, or the United Kingdom? In the Imperial House of Commons, members for English constituencies leave the details of Irish and Scottish estimates to Irish and Scottish members to discuss, for they feel that it is sound sense to leave their discussion to those who know something about them. Even in an Imperial Parliament, unified control is more a thing apparent than real. Another class of business for discussion and legislation would be the affairs of India; but Indian affairs demand a special knowledge. Indian trade, however, especially its extension in different parts of the Empire, would be fit matter for debate, as would be the problems of Indian immigration, but both these subjects would be beyond the province of a federal Parliament. It might weigh the views of experts on the defence, as well as the management, of the internal affairs of, India, Egypt, and the African dependencies; but bound by its limitations it would stop short at really vital questions, whose settlement would benefit the Empire.

For what useful end then, would the people ask, have we instituted this Parliament? We elect members to it and large salaries are properly awarded to them, but their chief business is to register the views of experts. The great distance preventing us from meeting our representatives face to face, learning their views and questioning them, makes representative government unreal; in establishing it we have parted with the substance of things for the shadow. The people of Australia and Canada might also say, Do we not already possess state, provincial, and federal Parliaments? Why must the burden of another Parliament be added? In truth the possibility of a federal legislature must always be dependent upon the existence of certain well-known factors. States which in the past have federated have been generally contiguous on a land area; and when this condition has existed, and there has been an absence of hostile feeling caused by different nationality, and complete unity has been otherwise unattainable from historical or other reasons, federation has been accomplished. Island communities, however, unless they are adjacent, have been unwilling to federate. Neither Newfoundland nor New Zealand has joined its neighbour federa-

tion, Ireland still laments her lost legislature, and the Isle of Man and the Channel Islands have always preferred their ancient legislative independence to the privileges of Westminster.

**The Essentials of Complete Federation.**—To ensure a complete federation it is also essential that there should be such a close similarity of economic conditions as to make it manifest that there is a reasonable possibility of obtaining a single control of customs and excise; one post and telegraph system: a sole authority to establish, administer, and direct an army and navy, and provide for the navigation of the coasts; a common code of law, and an executive to speak for all the parts in the name of the whole. The principle that recommends federation then is the economy of energy which is obtained by the substitution of one agency for many, and the consequent increase of power which is gained by the parts in combination. The British Empire is not ripe at the present time for such a complete federation as would demand a federal legislature nor do the suitable contiguous or economic conditions exist. There are tendencies, however, which only require the fostering care of statesmanship to strengthen and increase, to make it incomparably greater than it is. Is a lesser form of union than such as federal executive possible? Mr. Worsfold does not discuss the question and Mr. Curtis thinks—

"one which would transfer the control of foreign affairs to an Imperial executive responsible to not merely the Parliaments of the British Isles but to those of the Dominions impossible." He argues that "responsibility cannot be shared between five Parliaments because the Cabinet that controls foreign armies must control naval and military forces proportioned to the estimate of the facts which the Cabinet makes."

Admittedly so, but is there not a little confusion here? A federal executive presupposes an executive for the Empire, not five Parliaments but six. His contention then that responsibility could not be shared between two bodies would not hold good, since only one would share it. Responsibility of course can be shared in the largest sense of the word, and is shared. No one could doubt, for instance, that nations leagued for offensive and defence purpose share responsibility. Their executives agree and their legislature vote the money to carry out the agreement. Alliances are temporary arrangements, nevertheless they are workable. But where a

permanent executive is established—such, for example, as an executive which included the executives of the Mother Country and the Dominions—agreements arrived at would not only be workable, but far-reaching, permeating, and solidifying the Empire. Mr. Curtis makes an inquiry as to the position of a federal executive whose estimates were divided into sections each of which would be required to be passed by a separate Parliament. The position at least would be no worse than it would be under an Imperial federal legislature, for should a Dominion consider that it had been unfairly treated by a majority, its members could as effectively protest in the federal House as in its own Parliament. It could interpose delays for the purpose of rousing public opinion at home and in the last resort force would be the only remedy that a federal Parliament could employ. Supposing, however, that the executives were unified for Imperial purposes, but remained separate for strictly national purposes, agreements arrived at by them collectively for Imperial purposes could be carried into effect through existing national agencies. By way of illustration, supposing the Commonwealth Cabinet should agree upon what Australia's contribution to the defence of the Empire should be conjointly with the other Cabinets of the Empire, the Commonwealth Cabinet's position in Australia would not be weakened by the fact that it was fixed in consultation, but rather would it be strengthened because it would be felt that her general responsibility as a state of the Empire as well as her particular responsibility to herself was recognised and co-ordinated. Imperialism and nationalism would not then be opposing, but mutually assistant forces.

The case of Canada which is cited by Mr. Curtis is not in point. The Senate of Canada declined to pass the Government's naval estimates, which were resolved upon by the Cabinet after consultation with the Imperial authorities, but Canada had then no voice in shaping foreign policy. Sir Wilfrid Laurier's advice, "Call us to your councils," had not been acted upon.

**Construction of a Federal Executive.**—If a form of federal executive be deemed practicable, and no proof to the contrary has been shown, in what manner should a federal executive be constructed? The progress of the war has demonstrated that a committee of the Cabinet can direct a great war efficiently subject to the full responsibility of the Cabinet. The delegation of matters

to committees by the Cabinet, subject to Cabinet responsibility, has for some time been practised. Indeed, a similar practice formerly existed in the Privy Council when the Privy Council carried on the executive government of England. Some of its committees to this day survive in modified form—the Cabinet, the Judicial Committee, and the Board of Trade. Why then should not a committee of the Cabinets of the Empire control foreign policy, subject to each Cabinet's responsibility to its Parliament and its Parliament to the people? It may be objected that the Cabinets of the Empire are not committees of one body, but the committees of the Privy Council were. The objection is sound; the Privy or Executive Councils of the Dominion are separate councils which were constituted under their subordinate constitutions. The subordinate constitutions are reflexes of the Government of England, but no link connects them with each other but the Crown. At one time it seemed that such a link was on the way to formation; for a separate committee of the Privy Council governed the Empire. The admission of representatives of the plantations, with an early introduction of the Cabinet system in the American assemblies, might have led to the establishment of such a link, for none of the American constitutions was granted by Parliament, but by the Crown. A joint committee for Imperial purposes would have created the link. The changes, however, that took place during the reign of William III. proved fatal obstacles to any such development. The great continental war in which England was at that time engaged involved her merchants in severe losses. Parliamentary opposition, taking advantage of this fact, carried fourteen resolutions, insisting upon the establishment of a Council of Trade whose members were to be nominated by Parliament. A bill was read a second time which embodied these resolutions, but was dropped in 1696. Two months later a commission was issued by the Crown which created a Board of Trade. This Board when formed consisted of eight paid members, with all the chief officers of State as ex-officio members. The chief officers of State were not ornamental additions, for they often shared the deliberations of the Board, sometimes at its request, sometimes without any special request, and sometimes the Board attended Cabinet meetings. In theory the Board was a committee of the Privy Council, to which it reported and who accepted responsibility for its acts, but in fact it was dominated by Parliament. Its policy

was not one for the general welfare of the Empire, but for the subordination of colonial administration to the mercantile ends of Great Britain. Ultimately its duties were divided. Its administrative control over the colonies devolved upon the Colonial Office, whilst its trade functions became confined exclusively to British trade.

**The Position of the Privy Council.**—The institution of a federal executive would indicate that the Privy Council should become an Imperial Privy Council, and membership of its body then would be the necessary and additional qualification for Cabinet rank in the Dominions. A Dominion Cabinet would then become a Canadian, Australian, South African, New Zealand, or Newfoundland Committee of the Privy Council, and the equality of status of the King's Ministry would be established. Bagehot in writing of the Cabinet says:

> No one can approach to an understanding of English institutions or of others, which being the growth of centuries exercise a wide sway over mixed populations unless he divides them into two classes. In such constitutions there are two parts (not separable with microscopic accuracy, for the genius of great affairs abhors nicety of division). First those which excite and preserve the reverence of the population, the dignified parts if I may so call them; and the next the efficient parts, those by which in fact it works and rules. There are two great objects which every constitution must attain to be successful, which every old and celebrated one must have wonderfully achieved: Every constitution must first gain authority and then use authority. It must first use the loyalty and confidence of mankind and then employ that homage in the work of government. . . . The dignified parts are these which bring it force, which attract its motive power, the efficient parts only employ that power.

The historical associations that cluster round the King's Council, a body older than Parliament itself, would be the dignified parts of a constitution. Its operative parts would be found in the committee of the Cabinets, the Imperial Council; whose activities through the different governments in co-operation would permeate the Empire, providing for its defence, fostering its commerce, and breathing into it a new spirit. The problems that the creation of such a council would involve are matters of considerable difficulty not to be lost sight of, but it may be claimed that they are not so great as those which would surround the institution of a Federal legislature.

# SIR WILLIAM BLACKSTONE.

[*Contributed by* J. E. G. DE MONTMORENCY, ESQ., M.A., LL.B.]

**Family History.**—The preface dated February 20, 1781, of James Clitherow, the brother-in-law of Sir William Blackstone, to the first edition of *Sir William Blackstone's Reports*, is the chief authority for the life of a jurist who has not been without enemies as well as abundant honour in his own land and who, until comparatively recent times, was the principal source from which foreign students of English laws derived their knowledge of our legal system. Clitherow's pages are based on an intimate acquaintance for thirty years, on the testimony of still older friends of Sir William Blackstone, and on an autobiography—"a short abstract of every circumstance of consequence in his life, written by himself with his accustomed accuracy." Mr. G. P. Macdonell in the *Dictionary of National Biography* adds one or two other authorities, but nothing new or of substantial value exists outside the preface of 1781. Blackstone was the fourth and posthumous child of Charles Blackstone, "a Silk-man, and citizen and bowyer of London; who was the third son of Mr. John Blackstone, an eminent Apothecary in Newgate Street, descended from a family of that name in the West of England, at or near Salisbury: his mother was Mary, eldest daughter of Lovelace Bigg, Esquire, of Chilton Follyat in Wiltshire"[1] and sister of Dr. Bigg, the Warden of Winchester School. William was born on July 10, 1723, in Cheapside. He had three brothers, of whom the second, John, died while an infant. His eldest brother Charles and the third child Henry were educated at Winchester under the care of their uncle, and both became fellows of New College, Oxford. Charles, who was a Fellow of Winchester and Vicar of Wimering in Hampshire, outlived the judge. Henry became a physician and eventually took holy orders, and died in 1778, some two years

[1] *Reports*, 2nd ed. 1828, vol. i. p. viii.

before the judge, whilst Vicar of Adderbury in Oxfordshire—a living in the gift of New College. The mother of these brilliant children died in 1745. Some references to her family [1] throw a certain light on the forces that went to the making of the most distinguished of them. Dorothy Wither, a representative of a Wiltshire county family of some distinction, married Lovelace Bigg of Chilton Follyat in Wiltshire, and died in 1717. Of her six sons, William was a Balliol man and took up medicine, Henry became the Warden of New College, and Walter, also of New College, took his B.C.L. degree in 1727, and became Fellow of Winchester College. His son succeeded to the whole of the Wither estates in 1789. Of her six daughters, Mary, born in 1687, married Charles Blackstone, and became the mother of the jurist, and Alethea in 1719 married Seymour Richmond of Wallingford, who became the recorder of that town, and was succeeded in his office by his nephew, the jurist. It was a well-to-do family of considerable social position and great intellectual ability, and to it William Blackstone owed much both in natural gifts and in his start in life, but the business capacity inherited from his father was of no less value. It has been suggested that had his father lived, William would have been condemned to be a silk-mercer, and that his gifts would have been lost (if that is the appropriate term) in a warehouse or behind a counter. The probabilities are the other way.

**School and University Career.**—One of the Bigg family, Thomas, a well-known London surgeon, took the closest interest in the boys, and he especially looked after William, who in 1730 was sent to Charterhouse School. In 1735 he was admitted to the foundation of the school on the nomination of Sir Robert Walpole, at the recommendation of a cousin of Mrs. Blackstone, Charles Wither of Hall in Hampshire. The boy seems to have worked with extraordinary assiduity. At the age of fifteen he was the head of the school, carried off the Benson Gold Prize Medal for a poem on Milton, and delivered the customary oration at the Anniversary Commemoration of the founder. Blackstone left with a Charterhouse exhibition for Oxford, where he was entered as a commoner at Pembroke College on November 30, 1738, and on December 1 he matriculated. In February 1739 he was made one of the Lady Holford Exhibitioners at Pembroke. His Oxford life was

[1] See Burke's *History of the Commoners*, vol. ii. p. 401 ; vol. iii. p. 545.

one of close and arduous study. The state of the University at that date rendered all study voluntary and little encouragement was offered to the undergraduates. But for the student who demanded learning it was available even in the Oxford of 1738, and Blackstone was able to supplement an elaborate training in Greek and Latin authors with logic and mathematics and science.

**Legal Studies.**—Blackstone was admitted to the Middle Temple on November 20, 1741, and at once took up the close study of English law. In November 1744 he was elected a Fellow of All Souls' College, Oxford. From this date he divided his time between Oxford and the Temple, where he took chambers. His life was continuously laborious. At Oxford he pursued the theory of law, and took his B.C.L. degree on June 12, 1745. In London he closely followed legal practice, and was called to the Bar on November 28, 1746. Actual professional work came slowly, and his deficiencies as a speaker no doubt delayed his progress.

**Life and Work at Oxford.**—At Oxford Blackstone had a freer hand. He became Bursar of All Souls' and reorganised the system of college accounts, put the confused college muniments into regular order, and completed the building of the Codrington Library—a congenial piece of work, as the study of architecture had for many years been his sole recreation. In May 1749 he became steward of the College Manors, and in the same year Recorder of Wallingford in Berkshire. On April 26, 1750, he took his D.C.L. degree and became a member of Convocation—an event which synchronised with the beginning of a larger outlook in the academic life of Oxford. It was in this year that he published his *Essay on Collateral Consanguinity* in order to shut out the very numerous claims of kinship to the founder of All Souls' College put forward to secure priority of election into that society.

In 1753 Blackstone felt that the cost of attendance at Westminster Hall exceeded the profits, and in that year he returned to Oxford altogether with the intention, however, of practising in the provinces. He had already planned his Lectures on the Laws of England and—

> In the ensuing Michaelmas Term he entered on his new province of reading these Lectures; which, even at their commencement, such were the expectations formed from the acknowledged abilities of the lecturer,

were attended by a very crowded class of young men of the first families, characters, and hopes.[1]

On the conclusion of the first year of this course he issued what was in fact a *précis* of the *Commentaries, An Analysis of the Laws of England* for the use of those who attended his lectures. In 1755 he became a delegate of the Clarendon Press, and entirely reorganised that famous institution, and with this end in view made himself a master of the art of printing. The technical height to which he raised the Press may be judged by his famous edition of the Great Charter which was issued by the Clarendon Press in November 1759, a work that is hardly yet displaced. In 1757 Blackstone became a Fellow on the new Michel foundation of Queen's College, where his architectural gifts are recorded in stone to-day, and where he used his legal skill to secure the peaceable amalgamation of the new and old foundations.

Blackstone's lectures created a new interest in English law. It was seen that the study of that law was perhaps not less valuable than the study of the civil law. Charles Viner (1678–1756), who had devoted his laborious life to the construction of his *General Abridgment of Law and Equity* (1742–53), described in the *Dictionary of National Biography* as "a vast and labyrinthine encyclopædia of legal lore ill arranged and worse digested," left the copyright and remainder copies of the work and about £12,000 to the University of Oxford for the endowment of a chair together with fellowships and scholarships in the common law, and this chair by a certain natural equity fell to the only man who had realised the distressing fact that the law of England was left untaught both by the Universities and the decadent Inns of Court. And so it happened that on October 20, 1758, Dr. Blackstone was unanimously elected Vinerian Professor and five days later he read his famous introductory lecture which was separately published at the request of the Chancellor and Heads of Houses, and eventually formed the Introduction to the *Commentaries*.

**Legal Publications.**—The following year Blackstone resumed his practice in the Temple while he continued to lecture, out of the legal terms, on English law at Oxford. It was a period of extraordinary mental and physical activity. In 1759 he published two

[1] Preface to the *Reports, ubi sup.* p. xii.

pamphlets and his great edition of Magna Carta. In 1761 he issued his treatise on the law of descents in fee simple, and in the same year, despite the pressure of his law practice, he became member for Hindon in Wiltshire, took silk, and, such was the position that he had reached, was able to decline the chief justiceship of the Court of Common Pleas in Ireland. It was in this year that he married Sarah Clitherow, the daughter of James Clitherow, of Boston in Middlesex. He had by her nine children, of whom seven survived him. By his marriage he vacated his fellowship at All Souls', but Oxford needed him, and he became principal of New Inn Hall, and thus one of the Heads of Congregation. In 1762 he brought together his *Law Tracts* in two volumes. The following year he became Solicitor-General to the Queen and a Bencher of the Middle Temple. His activities at Oxford and in London were increasing, and in 1765 he issued the first volume of his famous *Commentaries on the Laws of England*. The remaining three volumes rapidly followed, and the whole work was completed in the year 1769. During the rest of his life the treatise was continuously revised, but the time was coming for the limitation of his extraordinary activities. He endeavoured to keep his Oxford lecturing alive by deputy, but this could not last, and in 1766 he resigned both the Vinerian Professorship and the Principalship of New Inn Hall.

**Bentham's Picture of Blackstone.**—Oxford was to know Blackstone no more, but his strenuous years at the University represent the awakening of the new life of that ancient seat of learning. In him we seem to see at Oxford not only the tireless worker, but the Oxford type which is familiar even in our time. He was still lecturing in 1764, and Jeremy Bentham, who attended his lectures in December of that year, has left us a vivid picture of this first Oxford don of the new school. Bentham, the persistent and malicious enemy of Blackstone, after telling us that he, the infallible Jeremy, had immediately detected Blackstone's "fallacy respecting natural rights" adds—

> Blackstone was a formal, precise, and affected lecturer—just what you would expect from the character of his writings: cold, reserved, and wary—exhibiting a frigid pride. But his lectures were popular, though the subject did not then excite a widespread interest, and his attendants were not more than from thirty to fifty. Blackstone was succeeded by

Dr. Beevor, who read lectures on Roman law, which were laughed at, and failed in drawing such audiences as Blackstone drew.[1]

If we deduct Bentham's malice from the picture, his words give a good idea of the man, who is known to have had a bad delivery and probably for this reason appeared "formal, precise, and affected . . . cold, reserved, and wary," and possibly is the first begetter of what used to be known as the Balliol manner in the days of Benjamin Jowett. For the purposes of the present paper it is unnecessary to dwell on the details of the later years of Blackstone's career. In 1768 he became the member for Westbury, and though he was hardly a success in the House of Commons,[2] where a very different type of orator was in fashion, he was offered in 1770 the Solicitor-Generalship on the resignation of the famous John Dunning. He declined the office, which would have carried him into unfamiliar and uncongenial fields, and on February 9, 1770, he succeeded Mr. Justice Clive as a Justice of the Common Pleas. He sat on the Bench for ten years and many of his judgments are on record. He died on February 14, 1780, and was buried in the Parish Church of Wallingford.

**Blackstone's Position as a Jurist.**—Blackstone's work as a jurist may be considered in the light of the attacks made upon him by the chief English legal theorists of his own age and of the succeeding age—Jeremy Bentham and John Austin.

William Blackstone deals with the theory of law in the second section of his *Introduction to the Commentaries*, and his views have been subjected to the severest criticism. Sir Henry Maine goes so far as to say that his discussion on the nature on laws in general "may almost be said to have made Bentham and Austin into jurists by virtue of sheer repulsion."[3] Mr. G. P. Macdonell in his life of Blackstone in the *Dictionary of National Biography* declares that "his philosophy of law was but a confused mingling of the theories of Puffendorf, Locke, and Montesquieu." These are serious criticisms and if sound seem to carry Blackstone out of the sacred circle of great jurists. It is therefore necessary to consider Blackstone's position in some detail. It is desirable to keep in mind first, the exact period when Blackstone wrote; secondly, the

[1] *Works*, x. 45.

[2] An astute debater convicted him of an error of law out of his own text-book!

[3] *Early History of Institutions*, ed. 1875, pp. 371–2.

fact that his was certainly not a confused mind; thirdly, that he was a highly trained practical lawyer, and brought a mind of that type to the consideration of the theory of law. On the other hand we have to bear in mind that neither Bentham nor Austin were practical lawyers, a fact which is manifest in everything that they wrote. It may be that there are certain advantages in entire detachment from legal practice, so far as pure juridical thought is concerned, but the want of knowledge of law as a practical system affecting the daily lives of men probably outweighs those advantages, and in fact the greatest jurists, men like Grotius and Savigny, were men of large legal experience. With these considerations in mind it will be convenient first to summarise the theoretical conclusions set forth by Blackstone, than to set out the general conclusions of Bentham, Austin, and some earlier, and with this material broadly surveyed discuss whether Blackstone is worthy of the reproaches heaped upon him by certain nineteenth-century jurists.

**Blackstone's Theory of Laws.**—The following series of quotations[1] gives us the position adopted by Blackstone:

1. This then is the general signification of law, a rule of action dictated by some superior being. . . .

2. But laws, in their more confined sense . . . denote the rules, not of action in general, but of *human* action or conduct. . . .

3. As man depends absolutely upon his Maker for everything, it is necessary that he should in all points conform to his Maker's will. This will of his Maker is called the law of nature. . . . When He created man, and endued him with free will to conduct himself in all parts of life, He laid down certain immutable laws of human nature, whereby that free will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws. . . .

4. He has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; . . . has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own [true and substantial][2] happiness." This is the foundation of what we call ethics or natural law. . . .

5. This law of nature being coeval with mankind, and dictated by God Himself, is of course superior in obligation to any other. It is binding

[1] *Commentaries.* See vol. i. of the 2nd ed. pp. 38 *seq.* (1756).

[2] Not in the first or second editions.

over all the globe, in all countries, and at all times, no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original. . . .

6. In order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason.

7. . . . There is, it is true, a great number of indifferent points in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy. . . .

8. If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws, than the law of nature, and the law of God. Neither could any other law possibly exist; for a law always supposes some superior who is to make it; and in a state of nature we are all equal, without any other superior but Him who is the author of our being. But man was formed for society . . . as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many; and form separate states, commonwealths, and nations; entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse, called "the law of nations," which, as none of these states will acknowledge a superiority in the other, cannot be dictated by either; but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities: in the construction also of which compacts we have no other rule to resort to, but the law of nature. . . .

9. It is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.

10. The only true and natural foundations of society are the wants and the fears of individuals . . . though society had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the *sense* of their weakness and imperfection that *keeps* mankind together; that demonstrates the necessity of this union; and that therefore is the solid and natural foundation, as well as the cement, of [civil] society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a State, yet in nature and reason must always be understood and implied, in the very act of associating together, namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole.

Now whatever else may be said against Blackstone's theory of

law it is certainly neither a confused theory nor a theory that is a pure figment of the mind without any basis in experience. There is inherent in matter, he says, certain operative principles which are essential to the existence of matter. He says that these principles are examples of a rule of action which he calls law. Now it is a common criticism of the position to say that we cannot compare the orderliness of nature which reveals itself in what are apparently invariable rules of action with the orderliness of man which reveals itself in obedience to rules of action which are apparently as variable as the will of the person in fact, at any given moment, responsible for such human rules of action. The so-called "laws" of nature, it is said, have really nothing in common with the laws imposed by human agency on man. The "laws" of nature, it is said, are not laws at all, but inherent conditions (arise how they may) of stability and permanence in a non-conscious material structure, while the laws of man are commands consciously imposed upon conscious personalities by a personality capable of enforcing such commands. The laws of man, it is argued, are not in any particular form essential to the existence of man, while the "laws" of nature are in that form and no other form essential to the existence of matter, are, in fact, not laws at all but the essence of matter itself.

**The Laws of Nature.**—All this is perfectly obvious, and was as obvious to Blackstone as to any one else. But the case does not end there. The first question the pure theorist would ask is this: Is there any element necessarily common to all systems, to every system, of human law? Is it possible to conceive of a human legal system from which this element is absent? If there is such an element it means that there is in human nature something of the same character as exists in material nature; "laws" of human nature which in some particular form and no other form are essential to the existence of human nature, are indeed the very essence of human nature itself. The theorist asks, "Does this element exist?" Through many centuries practical jurists and law givers, with all their intimate knowledge of human nature, have replied in the affirmative and have unhesitatingly formulated the law of nature. Blackstone boldly calls the law of nature "the will of God," a proposition that modern thinkers will find unobjectionable without necessarily adopting it. It is very generally admitted to-day that

there is a "Will" from some source or another implanted, or at any rate existing, in the innermost nature of man which does govern his actions in a very large range of operations, explain it how we will. Blackstone referred this will to a Supreme Being, to the same Being that gave matter its essential rules of action. Blackstone's view is far nearer modern thought as expressed in Mr. Balfour's Gifford Lectures than many juridical views expressed during the nineteenth century. A "law" of nature dealing with the conduct of man not only pervades every formulated system of law, but is to be found in the primitive customary systems of the least advanced races. Voigt declares that the Roman *jus naturale* had universal application in all ages, and corresponds with an inner conviction of right, and he formulates its propositions as the recognition of the claims of blood, the duty of faithfulness to engagements, apportionment of advantage and disadvantage, gain and loss, according to the standard of equity; the supremacy of the *voluntatis ratio* over the words or form in which the will is manifested.[1] Despite a famous and rather discredited passage in Ulpian which Sir Frederick Pollock regards as "a conceit borrowed from some forgotten Greek rhetorician,"[2] it is clear that the Roman *jus naturale* or *naturæ* applied only to man and was not shared by him with the lower animals, though no doubt even among animals there is an instinct of right conduct which in the evolution of things produced what we may call the invariable element in all human law. It is not proposed here to retrace the history of the law of nature in European society.[3] Blackstone's view is based on that of Hobbes, Selden, and Plowden, who in their turn largely took their views from Christopher St. Germain, who is the direct link with the schoolmen, with Dante and Marsilio, and the classical sources from which they drew. It is true to say that Blackstone took the same view of the law of nature that the profoundest thinkers before and since his time have taken. There is in man an unvarying intuition of right and wrong and it is of the same fundamental nature as the orderliness that is manifest in material nature. "There is something about

[1] Voigt, *Das jus naturale . . . der Römer*, pp. 304, 321–3; Muirhead's *History of Roman Law*, 2nd ed. pp. 280–2 (Professor Goudy).

[2] Notes to Maine's *Ancient Law*.

[3] See a paper on Hobbes by the present writer in *Great Jurists of the World*, pp. 195–219.

me that tells me *Fides est servanda*," wrote Selden. It is this " something " which is the *fons et origo* of all law. No doubt there are critics who complain that Blackstone has thought it necessary to supplement inherent law by direct revealed or divine law as set forth in the Holy Scriptures, but he especially declares that this is " really a part of the original law of nature." It in no way destroys, it may reasonably be part of, a reasoned philosophy of law to attribute to a special and inspired source certain *dicta* on which in fact men act, or admit that they ought to act, and which are clearly part of the *jus naturale*.

**Maine** *v.* **Blackstone.**—It will be convenient now to examine in some detail the attacks made upon Blackstone by Bentham and Austin. Maine, who in two passages in the *Early History of Institutions* (pp. 223, 273) recognises Blackstone's capacity, attacked him in the passage already cited (*ibid.* pp. 371–2), and again in the following passage (*ibid.* pp. 347–8):

> I imagine, however, that Blackstone influenced him [Austin], as he did Bentham, so to speak, by repulsion. Blackstone, following Roman Institutional writers, begins with a definition of law and proceeds to give a theory of the connection of the various legal conceptions. The desire to expose the fallacies of this portion of the Commentaries furnished Bentham with his principal motive for writing the Fragment on Government, and Austin with his chief inducement to determine the Province of Jurisprudence, and the latter seems to me to have thought that the propositions he disputed would be most effectually disposed of, if they were contradicted in the order given them by their author.

**Bentham's Attack.**—Jeremy Bentham in the preface to the first edition, published in 1776, of his *Fragment on Government*, writes as follows:

> If it be of importance and of use to us to know the principles of the element we breathe, surely it is not of much less importance, nor of much less use, to comprehend the principles, and endeavour at the improvement of those *laws*, by which alone we breathe it in security. If to this endeavour we should fancy any author, especially any author of great name, to *be*, and as far as could in such case be expected, to *avow himself* a determined and persevering enemy, what should we say of him? We should say that the interests of reformation, and through them the welfare of mankind, were inseparably connected with the downfall of his works, of a great part, at least, of the esteem and influence which these works

might, under whatever title, have acquired. Such an enemy it has been my misfortune (and not mine only) to see, or fancy at least I saw, in the author of the celebrated *Commentaries on the Laws of England:* an author whose works have had, beyond comparison, a more extensive circulation, have obtained a greater share of esteem, of applause, and consequently of influence (and that by a title on many grounds so indisputable), than any other writer who on that subject has ever yet appeared. It is on this account that I conceived, some time since, the design of pointing out some of what appeared to me the capital blemishes of that work, particularly this grand and fundamental one, the antipathy to reformation; or rather, indeed, of laying open and exposing the universal inaccuracy and confusion which seemed to my apprehension to pervade the whole.

This is sufficiently offensive, even if the charge be true, and phrasing largely flavoured with vulgar abuse follows. Bentham proposes to review Blackstone's Introduction other than the "Discourse on the Study of the Law." What is left of the Introduction, "however narrow in extent, was the most conspicuous, the most characteristic part of our Author's work, and that which was most his own." Then Bentham adds with amazing want of generosity: "the rest was little more than compilation." England had had to wait long enough for this compilation—an achievement attempted by English lawyers before this date, and without success. However, Bentham is angry with Blackstone not for merely setting forth English institutions as he considered them to be, but for giving reasons justifying those institutions. "The very idea of a *reason* betokens approbation, so that to deliver a remark under that character, and that without censure, is to adopt it." Bentham's anger and curious witticisms make him often incoherent. But before turning to his detailed criticism of the latter part of the Introduction to the *Commentaries* he attacks what he calls "that spirit in our Author which seems so hostile to Reformation, and to that Liberty which is Reformation's harbinger." He adds that it is not in the Introduction that—

> he tramples on the right of private judgment, that basis of everything that an Englishman holds dear; it is not here, in particular, that he insults our understandings with nugatory reasons; stands forth the professed champion of religious intolerance; or openly sets his face against civil reformation.

The extraordinary bitterness of the attack launched at Blackstone by Bentham was no doubt chiefly due to the undoubted fact that the law which the jurist set forth was hampered by the extraordinary cost and delays of litigation, and thus in many cases the whole object of the law was frustrated. Bentham as an enthusiastic reformer cared nothing for the theory or history of law. He saw manifold evils and was for reformation at any cost. Those evils were certainly present to the mind of Blackstone, but the business of his treatise was not reformation of the law or of lawyers, but the compilation, to use Bentham's phrase, of the laws of England as they stood in his day. Such a compilation, if brought home to the minds of the people, was necessarily the first stage of reform. Though Bentham did not choose to see this, he yet saw how admirable a piece of work the Vinerian Professor had performed. He writes:

> Correct, elegant, unembarrassed, ornamented, the *style* is such as could scarce fail to recommend a work still more vicious in point of *matter* to the multitude of readers. He it is, in short, who, first of all institutional writers, has taught Jurisprudence to speak the language of the Scholar and the Gentleman; put a polish upon that rugged science; cleansed her from the dust and cobwebs of the office; and if he has not enriched her with that precision that is drawn only from the sterling treasury of the sciences, has decked her out, however, to advantage, from the toilette of classical erudition; enlivened her with metaphors and allusions; and sent her abroad in some measure to instruct, and in still greater measure to entertain, the most miscellaneous and even the most fastidious societies. The merit to which, as much perhaps as to any, the work stands indebted for its reputation, is the enchanting harmony of its numbers: a kind of merit that of itself is sufficient to give a certain degree of celebrity to a work devoid of every other. So much is man governed by the ear.

Blackstone could afford to forgive much in the light of such praise. But Bentham nevertheless holds his substantial victim well in hand. If Blackstone animadverts against legal abuses, Bentham refuses to believe that it is the authentic Blackstone: "one would think some Angel had been sowing wheat among our Author's tares." The "principal and professed purpose" of the *Fragment on Government* Bentham tells us is to expose "the errors and insufficiencies" of Blackstone. The essay was issued anonymously. Dr. Johnson attributed it to that mighty lawyer Sir John

Dunning, the first Lord Ashburton, so Bentham in the "historical preface" (1828) to the second edition declared. He also claimed that this *Fragment*—

> was the very first publication by which men at large were invited to break loose from the trammels of authority and ancestor-wisdom on the field of law (*Works* i, 260 *n*).

I should have thought that the *Commentaries* themselves might have claimed priority. The essay deals with the passages relating to the nature of society and civil government and the right of governments to make laws. Bentham in his first chapter on "The Formation of Government" attacks Blackstone's theory of society and his conception of the fashion in which social groups sprang from single families. He deliberately misunderstands Blackstone's view and ponderously ridicules it, declaring the problem to be unsolvable. He is angry that Blackstone has introduced the phrase of original contract. The idea is fictional, therefore it must die. Bentham never faced the fact that in all ages and times law has grown by means of fictions. Truth in the Benthamite sense is to be life's only fare. But Bentham has an unhistoric reason of his own to account for the obedience of the subject to the sovereign; it is for the benefit of society that it should be his duty to obey as long as it is his interest to do so. In a word society is built upon "the principle of utility . . . which is itself the sole and all-sufficient reason for every point of practice whatsoever."

Bentham goes on to blot Blackstone's favourable vision of the British constitution. His own vision is not ready: "if ever I do think it worth the giving, it will hardly be in the form of a comment on a digression, stuffed into the belly of a definition." Bentham dismisses the Law of Nature as "Nothing but a phrase," and proceeds to apply the principle of utility to the making of laws. The principle would lead in all cases to a "visible and explicit issue." The whole essay is a mixture of irony, criticism, and intangible suggestion. That it substantially injures Blackstone's position is certainly not the case. The principle of utility is a dangerous weapon. Deftly applied it might well lead us to the very position occupied by Blackstone. But Blackstone was really the first of the moderns, the frank adopter of the new ideas of Montesquieu promulgated in

the *Persian Letters* and the *Spirit of Laws*. Blackstone adopted without hesitation the new theory of heredity and environment in law. The law at any moment is the resultant of processes of growth and environment. Such a conception was unspeakably repellent to Bentham, whose one idea was that men should " break loose from the trammels of authority and ancestor-wisdom on the field of law." The position of Blackstone is that this would be as impossible as for matter to break forth from the trammels of the Newtonian laws and from the processes of evolution. To Blackstone reform meant the adjustment of " the principle of utility " to the law of nature. It is purely human law, the arbitrary dictates of one temporarily in power, that is the cause of evil. To Bentham the presence of evil was sufficient to make necessary a clear field ready for a new code pronounced to be utilitarian by a new law-giver. Blackstone argued in effect that time and the processes of history are the only tests of true utility, and he believed (as men have believed ever since) that time and history had given to the English common law, as long before it had given to Roman law, a prominent position in view of its permanently utilitarian and easily adjustable character. Blackstone was a convinced optimist in the teeth of many admitted evils since he saw that the English constitution and the English common law had, broadly speaking, through many centuries served well an independent people, and had played a great part in preserving that independence in the successive ages during which Europe at large had undergone the travail and sorrow of unstable laws and constitutions. Blackstone was in some sense a legal Platonist. He believed in a model code laid up in the Heavens—an ideal law of nature—and he thought that English law not only contained, as the product of experience, a large element of this law, but that the processes of further growth would give a closer approximation. It was no mean faith, no contemptible philosophy of law.

**Austin's Attack.**—We may now pass on to summarise some of the criticisms that John Austin levels at William Blackstone. In common with the classical Roman jurists Blackstone (we are told) frequently confounds " the *occasions* of laws, or the *motives* to their establishment . . . with their *sources* or *fountains*." He in common with the Roman fancies—

that a rule of law made by judicial decision on a pre-existing custom,

exists as *positive law*, apart from the legislator or judge, by the institution of the private persons who observed it in its customary state.[1]

Blackstone and others "have misapprehended grossly the true import of the division" of law into law of things and persons "and have turned that elliptical and dubious language into arrant jargon" (p. 42), while the phrase *jus personarum* "has been involved in impenetrable obscurity by Blackstone and Hale" (i. 364). Austin declares that:

The method observed by Blackstone in his far too celebrated Commentaries, is a slavish and blundering copy of the very imperfect method which Hale delineates roughly in his short and unfinished Analysis. . . . Neither in the general conception, nor in the detail of his book, is there a single particle of original and discriminating thought. . . . He owed the popularity of his book to a paltry but effectual artifice, and to a poor, superficial merit. He truckled to the sinister interests and to the mischievous prejudices of power; and he flattered the overweening conceit of their national or peculiar institutions, which then was devoutly entertained by the body of the English people, though now it is happily vanishing before the advancement of reason (i. 69). He erroneously distinguishes between a law and a particular command (i. 94). He erroneously supposed that human laws are of no validity if contrary to Divine laws (i. 215). He erroneously declares that a master cannot have a right to the labour of his slave (i. 216). He confuses Right as meaning conformity with a rule and Right as correlating with duty (i. 399). He wrongly distinguishes civil injuries as private wrongs concerning the individual only, and crimes as public wrongs affecting the whole community (i. 204).

"*All* offences affect the community, and *all* offences affect individuals." But offences that do not affect Rights must be pursued by the sovereign, that is to say, criminally. Blackstone wrongly supposes that "all the judiciary law administered by the Common Law Courts (excepting the judiciary law which they have made upon statutes) is *customary* law" existing as positive law which is declared, not created, by those Courts (ii. 538–9).

The origin and history of the peculiar Courts in this country, styled Courts of Equity, has been given with great clearness by Blackstone, in probably the best chapter of his whole work (ii. 615).

[1] *Lectures on Jurisprudence*, vol. i. p. 36 (1885).

Blackstone's view that the decretals of the Roman emperors "contrary to all true forms of reasoning, argue from particulars to generals," is wrong, since the decretal "is a judicial decision establishing a new principle," and is therefore "a decision of a particular by a general." This is due to the views of judges that judge-made law is really declaratory law (i. 634). Blackstone mixes up status with the law of things. What Blackstone calls absolute rights are natural or inborn rights . . . "those which reside in a party merely as living under the protection of the state; or as being within the jurisdiction of the state; if the party have any rights whatever, which the Roman slave had not" (ii. 728). Blackstone opposes to these rights (the rights of individuals arising in a state of nature) what he calls "relative rights of persons." But all rights are relative. Blackstone treats—

rights to life, reputation, etc., with the obligations to respect them under the rights of persons; although as being common to every *status*, it is manifest that they belong to the rights of things. They are in truth universal *jura in re sine titulo* (ii. 737).

On the other hand Austin considers Blackstone superior to the Roman institutional writers and the French code in treating civil injuries and civil procedure separately as also crimes and criminal procedure, but declares that—

like Gaius and the compilers of the Institutes, he has no definite purpose in detaching the Law of Persons from that of Things. Throughout the Law of Things much that arises out of *status* is considered. *Therefore* if he intended to make the law of persons relate to rights, etc., *ex statu*, he has not adhered to that intention. On the contrary much that relates to *status is* considered under the law of persons; so that if he intended law of persons to contain a mere enumeration of *status*, with the modes in which they begin and end, he has equally deviated from that (ii. 736).

But Austin praises Hale and Blackstone for placing "the law of political persons in the Law of Persons" despite the charge of the German jurists that this is a great absurdity importing great confusion of ideas. Austin regards the classification as a "striking indication of" Hale's "originality and depth of thought." He was no mere copyist of the Civilians (ii. 751). Austin also regarded

Blackstone as superior to the Roman institutional writers and the French Code in separating substantive and procedural law (ii. 735, 769).

If we pass by Austin's rather violent and obviously unjust abuse of Blackstone it is difficult to find any criticism that really injures Blackstone's theory of law. It may be that the distinction between the law of persons and the law of things as given by the author of the *Commentaries* is open to criticism. The dividing line is very fine and there is much disagreement on various points as to the ideal division. The charge that Blackstone's method involves the notion that "things have rights" is perhaps hardly fair. That things have juridical qualities is an arguable proposition, and it is easy to make this appear as a statement that things have rights. The statement that Blackstone asserted that human laws have no validity if contrary to divine laws is a wilful misapprehension of his position. Blackstone's view as to custom being law that is declared, not created, by the Court is right, and Austin's contrary view is wrong. Austin never formally attacks Blackstone's doctrine of a law of nature, though he objects in a formal fashion to the comparison of rights under this law as absolute with the rights under other forms of law as relative. But Blackstone's position, given his premises, is sound. If the law of nature is immutable, rights under it are absolute.

**Blackstone and the Criminal Law.**—The charges made against Blackstone by implication and directly by Bentham are best met, as all such charges are best met, by reference to the facts. First consider Blackstone's attitude towards crime and punishment. On these subjects he held views that might well have inspired Howard, and in fact his views were based on his knowledge of law and the views of Beccaria. The first chapter of Book IV of the *Commentaries* dealing with Public Wrongs is not only a fine example of English prose, but is full of noble and humane thought. Blackstone practically classifies crimes as offences against natural rights and offences against social rights. He declared, and gave great offence in declaring, that "the right of property owes its origin, not to the law of nature, but merely to civil society," and that therefore crimes against property are not "offences against natural, but only against social rights." The hardened Tory depicted by Bentham would have held no such view. The rights of property were very sacred in the

late eighteenth century. To Bentham they were merely conventional. It is true that Blackstone in form justifies in certain circumstances capital punishment, but it is "the enormity, or dangerous tendency of the crime, that alone can warrant any earthly legislature in putting him to death that commits it," and he boldly commends Catherine II. for abolishing capital punishment throughout Russia; he protests vigorously against the use of capital punishment in the case of "slight offences, or such as are merely positive." With bitter irony, which recalls Gibbon in his most effective mood, he declares that "it is, it must be owned, much *easier* to extirpate than to amend mankind"; he compares the mitigations afforded to robbers as compared with murderers in China and England, and denounces the English criminal law with an irony, pathos, humanity, and logic which should make this passage memorable. It is at any rate surely certain that Bentham never read it.

What is "the *end* or final cause of human punishment"? Blackstone asks, and his answer gives a theory of penalties which is sound and workable to-day, and is perhaps the most biting comment on the practice of his own day that was ever penned. Blackstone, it must be remembered, was professedly writing "for the consideration of such as are, or may hereafter become, legislators," and it may be claimed on his behalf quite as definitely as it can be claimed on behalf of the noisy bludgeon-wielding Bentham that he was a reformer. But Blackstone's weapon was the rapier. Those who know the state of the practice of the criminal law and the condition of the gaols in England at the date when he wrote can appreciate the spirit of reformation in which he penned the great passage on the end of human punishment.

The vast circulation of the *Commentaries* not only in England and America and our whole colonial system, but on the Continent of Europe, must have made these views part of the outlook of juridical thinkers and local legislatures, and have hastened forward the revolution of thought on crime and punishment that dates from about Blackstone's time. But certainly in the teeth of such views the great bulk of Bentham's criticisms falls to the ground, and it is very difficult to see that Austin's criticisms have any substantial basis. It is true that Austin makes some acute attacks on Blackstone's method of classification, but apart from this Blackstone's general views on sanction and on the province of jurisprudence are really

nearer the conceptions of our time than those not altogether dissimilar views formulated by the great mind of John Austin.

**Blackstone and Pleadings.**—Another point on which it is important to see Blackstone's views is that of the technicality of pleadings. The long chapters on procedure at the end of the third book of the *Commentaries* are remarkable, not only for lucidity and pungency, but as a remarkable record exact in detail and living in form of the procedure that obtained in England in the mid-eighteenth century; and this is particularly true of the final chapter on Chancery procedure which reveals in a striking manner the life and purpose of the Courts that Dickens was destined to attack. It is in these chapters that we see the singular advantage that arises when a jurist combines speculation on the theory of law with a profound and detailed knowledge both of the substantive law and the adjective or procedural law actually in force at the time. Blackstone saw perfectly well the evils to which cast-iron procedure led, and admits that the speedy and safe working of the law depends upon the liberal character of the judges. It did not seem to occur to him that there might be illiberal judges in the future as there had been in the past, and that the whole doctrine of amendment of pleadings really rests upon the minds of the judges and the outlook of the legal profession.

No doubt too in the days of Blackstone there were criminal abuses in the Courts of Equity, but he does not attack them, possibly because he had no personal knowledge of those Courts. Yet the worst abuses probably came after Blackstone's day, when the liberality of mind which he claims for the judges of his day had passed away. But Blackstone stood for the theory of the law as he saw it, and he declared that whatever the faults of administration that theory was good, though he realised the danger of conflicts between law and equity and emphasised it in a passage of great power.

**Blackstone's Achievement.**—Blackstone is able in such passages to indicate popular opinion, to touch with irony both actual legal practice and public opinion of that practice, and to state, as he sees it, the true theory of the law as it came to be. Blackstone was not a professed reformer, but he did profess to place a true picture of the law on record, and this he has done without doing violence to his own professional outlook. He might well have smitten the legal system hip and thigh, but it may be doubted if he had done so whether he

would have been as effective a reformer or as sound a jurist as he actually was. The sad case of Mr. Bentham rises up and justifies Dr. Blackstone. The true criticism, and it is at the same time the true praise, of Blackstone is that he believed in a rapid evolution of the English common law which would cleanse it from all impurities and bring it into close approximation to an ideal law. He was certainly wrong. A century or more was to elapse during which the law was to suffer many things at the hands of legislators and judges. The process of purification was to be forerun by a process of decay. This fact laid Blackstone open to swift and effective attack. He believed that an era of liberalism in law was at hand, and he was wrong. But this position, despite the opportunity for criticism that it offered, was all to his credit as a jurist. He saw with perfect clearness that given liberal-minded judges and a wise legislature the legal institutions of England were capable of achieving without any fundamental changes superb things for the human race. Was he not justified when the great judges appeared, the line of giants beginning with Stowell and Eldon; was he not justified when the legislature began the processes of purification; was he not justified when Dominion after Dominion moulded the great common law of England to the purposes of new realms and new ages; is he not justified to-day when a large part of the human race dwells in freedom and peace under the shadow of the laws that he was the first to rationalise and immortalise in the pages of his *Commentary*? To-day the great common law of England divides with the law of Rome the allegiance of modern civilisation, and William Blackstone played no mean part in the achievement of so superb a consummation.

# IMPERIAL EDUCATION.

[*Contributed by* EDWARD JENKS, ESQ., M.A., B.C.L.]

AMONG the most obvious of the many problems which will press for solution at the close of the Great War, none will be more urgent than the question of how to maintain and crystallise the quickened sense of unity which the war has engendered among the various members of the Empire. On the one hand, it will be as impossible as it would be, in the writer's view, undesirable to reproduce, in the world-wide orbit of the British flag, the rigid machinery of a centralised Empire. On the other, there are signs, indefinite, perhaps, but unmistakable, that both the Mother Country and the Britains beyond the Seas will be profoundly disappointed if the opportunity is missed of realising a unity more definite than the somewhat vague sentiment of sympathy and friendliness which prevailed until a few months ago. It is true that some of us have long cherished a belief, abundantly justified by recent events, that the existing sentiment of union between the various members of the Empire would stand a severer strain than many pessimists feared. None the less, we are fully alive to the value of a judicious fostering of that priceless spirit which has hitherto been left to express itself mainly in vague and unpractical ways. Personally, the writer of these lines has hardly yet recovered from the shock of astonishment and anger with which, less than ten years ago, he received a deliberate proposal, from a person who afterwards became a member of a British Cabinet, to join a movement for the voluntary dissolution of the British Empire. Such a proposal, from a similar source, would now be regarded as evidence not merely of political but of physiological lunacy.

Every practical proposition is conditioned by circumstances. What are the governing circumstances which condition the proposal for a closer organisation of the British Empire?

**The Unifying Influence of the War.**—The first and most obvious is, of course, the fact of the war. The war has brought together,

not merely in social intercourse, but in a life-and-death struggle with a powerful and unscrupulous foe, thousands, hundreds of thousands, of men who, but for the war, would have had but a faint and distorted vision of one another's characters and ideals. Some beliefs and some reputations have, doubtless, failed to stand this crucial test. But, all in all, there has resulted an immense increase of sympathy and mutual respect, especially among the rank and file, in all spheres—military, political, commercial, and social. The skill, endurance, and courage which have enabled the British Navy to perform the colossal task of policing the oceans of the world and sweeping therefrom the commerce of the enemy, the self-sacrifice of the Expeditionary Force, which beat off and ultimately drove back in headlong rout enormous forces elaborately trained by years of preparation and used without any scruple of right or honour, the cheerful abandonment of homes and careers which sent millions of volunteers, from all parts of the Empire, to winter in the trenches of Flanders or to face the burning suns of Egypt and Gallipoli—all these things, to say nothing of the less prominent but none the less real and ungrudging sacrifices of health and fortune made by those unable to take a direct part in the war, have engendered feelings which it would be criminal folly to neglect.

**The Basis of Imperial Unity.**—Our enemies also have, all unconsciously, contributed, not only to the growth of the spirit of unity in our ranks, but to the solution of post-war problems. Long before a definite knowledge of the origins of the war permeated the world, the Prussian system had written its doom in letters of blood and fire on the ruined homes and churches of Belgium and Northern France. So colossal was the display of force by the foe at the outbreak of the war, so unscrupulous his use of it, that the neutral world at first shuddered in silence, and made but feeble and ineffectual protest against the wanton desecration of the ideals of Christian civilisation. But the Allies set their teeth, and, shoulder to shoulder, offered their bodies as a barrier against the flood of destruction. No doubt could exist in their minds, as too often in other wars, as to the objects for which they were fighting. "Death rather than that" became the motto, not only of the soldier in the trenches, but of the civilian at home. Even the rare critics of the war in the Allied countries did not dispute the justice of the Allied

cause; they merely professed to doubt the methods by which it was supported. In every other great war which our country has waged since popular opinion became articulate, there has been a considerable party of honest and patriotic citizens who have sincerely opposed hostilities. In this war, whilst there has been abundant criticism of the administration, it has, with exceptions so trifling as to be hardly worth mentioning, been entirely directed to demanding greater earnestness and efficiency in its prosecution. *Idem velle et nolle*—there could hardly be a stronger basis of unity.

If, therefore, as seems almost too plain for argument, the future, so far as political machinery is concerned, lies with those self-governing institutions which, *per se*, lead to decentralisation rather than common action, we are compelled to look for the fostering of unity to indirect, rather than direct influences. Of these some will be automatic or merely mechanical. The economic requirements of the decade following the war will necessitate an enormous going to and fro of specialists in all branches of industry, not only within the Empire, but in the territories of its gallant Allies. These specialists, being men of intelligence and force of character, will unconsciously link together the communities which they serve. Almost the first necessity in the repair of the ravages of war will be the improvement of means of communication; and these again will facilitate intercourse and stimulate unity and mutual understanding.

**Breadth of Educational Ideals.**—But it is one of the defects of unconscious education that it is apt to produce one-sided characters. Experience, like fire, is a good servant, but a bad master. Quite apart from the fact that its lessons may be misinterpreted, it is necessarily partial in its effects, because the scope of its operations is limited. This defect must be corrected by the wider vision of the educators in the technical sense, *i.e.* the men or women who devote their lives to the training and equipment of human faculties, and principally, though not by any means exclusively, by means of personal intercourse. A generation ago, there was a tendency amongst advanced thinkers to assume that the day of the oral teacher was over. But more recent observation has corrected this view, as based upon the capacities of the abnormal person, who is quite capable of taking care of himself; and public opinion is now coming back to the conclusion of Gibbon—certainly no excessive

admirer of academic institutions—that there are advantages in oral teaching which no book or writing can convey.

But this fact obviously renders the interchange of teaching facilities and influences between distant countries more difficult. It remains true, as in J. S. Mill's time, that of all things man is the most difficult (because the most costly) to move, and if the teacher, still more the pupil, partly because of his greater numbers, partly because of his circumstances. At least this is true of the teaching of the young; and though, as will be hereafter suggested, it is too much the fashion to regard education, in the technical sense, as a problem only of the young, yet it must be admitted that the education of youth must always, from the nature of things, be the most important of educational problems.

**Unity of Speech.**—Again, it is unthinkable that, as a result of a war waged to uphold the principles of freedom and self-government, there should be any attempt to introduce uniformity into such a matter as education. Whilst it is probably true that the German pretensions of missionary enterprise and a burning desire to confer the blessings of *Kultur* upon a benighted Europe were as fraudulent as they were ridiculous, it must not be forgotten that the loathing with which they are now regarded would have been almost as great, even if they had been believed to be sincere and well-founded. We must beware, therefore, of cherishing the dream, so dear to a certain type of administrator, of a universal scheme of education for the Empire, which shall render the interchange of teachers a mere matter of travelling expenses. Even the Anglo-Saxon tongue, which is, perhaps, on the whole, after the loyal devotion of the Empire to the Crown, the most priceless instrument of Imperial unity, cannot be forced upon the universal acceptance of the Empire, but must be left to make its way by its own merits. Nor need the recognition of this truth cause us to despair, when we reflect that one of the most united and best-governed States of Europe, though tiny in numbers, has no uniform official language. The way to make English speech universal throughout the Empire is to associate it, in the minds of the nations of the Empire, with all that is just, and generous, and profitable, and picturesque, and able, and attractive. Its own inherent merits will do the rest.

**Teaching of Imperial History.**—Perhaps next in importance, as a link of unity, to the English speech, is the history of the Empire.

It is true that some of the remoter nations of the Empire take no part in that history until a recent date, and that they have histories of their own which they naturally cherish. But it is the good fortune of the British Empire that it owes its existence only partially to conquest, and very largely to peaceful colonisation of lands which had then no history at all. The history of Australia and New Zealand, hardly less of Canada, and to a certain extent of South Africa—the four greatest self-governing Dominions—begins with their incorporation into the Empire. Thus they inherit, by natural adoption, the glories of British history, from Creçy and Poictiers to Trafalgar and Waterloo. And thus it should be possible, for writers and teachers with the gift of imagination, to build up the hitherto neglected fabric of Imperial history, and to place upon it, as a golden roof of world-wide splendour, the majestic and united achievements of the Great War. Even now we should be training a school of Imperial historians, who, at the commencement of peace, will be prepared, in all the countries of the Empire, before the glow of victory has paled, to show how the sacrifices and triumphs of the war are but the natural sequence of generations of honest industry and upright administration, of hatred of tyranny and sympathy for the weak, of heroic endurance and self-sacrifice, which have made the British flag respected throughout the world.

**Attachment to the Homeland.**—Even less open to dispute, and utterly incapable of arousing either jealousy or apprehension, are the physical charms of the present seat of Empire. No one questions the grandeur of the Hudson and the Pacific slope of Canada, the splendours of Kashmir and the solitary wonder of the New Zealand Sounds, or the marvels of the Drakensberg and the Matoppo Hills. But there is a charm about the age-long peace of England, its rich country-sides and venerable fanes, its feathered songsters and its woods carpeted with wild flowers, about the storied hills of Scotland and the lakes of the Emerald Isle, before which almost every visitor from a distant land bows down with ungrudging reverence. There is nothing quite like it elsewhere in the Empire, perhaps in the world; and more than one keen critic of British character and British institutions has softened before the charm of an English country-side. To have remained "home" to thousands who have never seen these shores, is a supreme triumph for the

British Isles, a vital link of Imperial unity. Let us use it freely. Let us make familiar by picture and by writing, above all by hearty welcome to every guest, this sacred shrine of pilgrimage; so that, in the mind of every Briton beyond the seas, there may arise the sacred image of a Celestial Land, no rival of his own hearth and homestead, but a beckoning vision which he may drink in as an honoured and welcome guest, and thence draw inspiration and refreshment for his struggle with a sterner world.

**The Ancient Universities.**—And among these priceless gifts of nature and of art, there are, surely, no more powerful magnets to draw the feet of young and old, but especially of the young, than the ancient universities of the British Isles. The writer of these lines will not be accused of undervaluing the newer universities and colleges which have sprung into such vigorous life throughout the Empire within the last century, in more than one of which he is proud to have rendered humble service. But in the storied halls and courts of Oxford and Cambridge, of Edinburgh and Glasgow, of Aberdeen and St. Andrews, and of Trinity College, Dublin, there lie a charm and influence, a bond of unity, of unrivalled and enduring power, if only they can be made familiar to the citizens of the Empire. Much has been done already, by the efforts of public-spirited men and women, by Extension Meetings and the Rhodes Trust, to break down that spirit of exclusiveness and privilege which naturally coincided with the very worst period of academic sloth and inefficiency. The days in which college dons treated their fellowships and offices as private property have passed away, let us hope never to return. But much, very much, remains to be done to put to their fullest use the inexhaustible treasures of these ancient seats of learning, and to throw them open to those from all social classes and all the lands of the Empire who will turn them to good account. Barriers of age and sex, of caste and prejudice, of religious and social exclusiveness, must be swept away. Those who fear that this process will destroy the very charms which are the hall-mark of the ancient universities betray their own want of faith in the traditions of which they are the guardians. What will really happen will be that certain privileged idlers, certain unreasoning opponents of change, certain pretentious but shallow pundits who have climbed to place and power by pandering to the prejudices of ignorance and interest, will be shaken in their seats. But the real

men, who have spent and are spending themselves freely for their students and the cause of education and learning, will rejoice exceedingly; and the sacred groves of Academe, instead of being deserted during half the year, and but imperfectly used during the remainder, will resound with the happy voices and the busy feet of crowds of worshippers who will return to their work-a-day tasks with hearts flowing with affection for the temples of Art and Science, and a passionate determination to defend them to the death against the foes of the Empire.

**University Reform.**—But the difficulties in the way of this desirable transformation cannot be overlooked; and to convince the powers that be of its desirability is but half the task before the organiser of the Empire's resources. There are signs that, at least for some years after the Great War, life will be harder, instead of easier, than before it, to the average citizen of the Empire. The immense ravages of war, direct and indirect, will have to be repaired; military precautions against another outbreak of disappointed rage will have to be taken, at the expense of much time and money; economic profit will have to be sacrificed to security and self-respect. Nevertheless, if we neglect the things of the mind, we shall perish as surely as if we neglect those of the body. We must combine the sternness and practical wisdom of Rome with the arts and the philosophy of Greece, if we are to avoid the fate of both. To achieve this end, we must be prepared to work harder than before, to discard easy habits, to question all accepted customs, to put, if necessary, three years' work into two. It is not claimed that this process will be without its drawbacks; but it may be the alternative to going under, and every wholesome instinct of our nature revolts against the easier choice.

To take a concrete example. Every one familiar with the practical working of the older English universities knows that much of the expense, and, therefore, much of the exclusiveness of their curricula, lies in the fact that, with trifling exceptions, three years of residence are an essential minimum for the hall-mark of the degree. But it does not seem to be recognised that, *so far as formal teaching is concerned*, all that is now done in three years could be done in two, with a consequent diminution, both of time and expense, to the average student. The present academic *triennium* consists of, roughly, seventy-two weeks' actual residence. There are fifty-two

weeks in a calendar year. If thirty-six of these were devoted to residence, leaving a not inconsiderable margin of sixteen weeks for vacations, the teaching curriculum which now occupies three years might be covered in two. It is not claimed, of course, that a two years' residence would be of the social and intellectual value which attaches to three. But it would be infinitely preferable to no residence at all; and many a home and colonial student who shrinks from the cost of a three years' course would joyfully rise early and work late to accomplish the more possible two, to his own great advantage and that of the Empire, while the more fortunate could, as at present, add a year of residence, either as graduates or undergraduates, to the minimum period.

The writer of these lines is perfectly aware that a proposal such as he has outlined will be received, if it is deemed worthy of notice at all, with a storm of abuse and a flood of argument intended to prove its impossibility. All that is common form, and the familiar attendant of every project for the re-organisation of ancient resources. Naturally, the proposal could not be carried out by a stroke of the pen. Due provision would have to be made for readjustment of duties and stipends, the recasting of curricula, the provision of Sabbatical years for teachers who now use the vacations for research, the sweeping away of much of the unnecessary apparatus of ceremony and formality which at present occupies the time of teacher and student, and other ancillary changes. It is possible that the time hitherto devoted to the elaborate organisation of sports and social intercourse might have to be somewhat reduced. But there is absolutely no difficulty in it which could not be overcome by a month's session of a small body of experts, presided over by a first-class administrator, and having power to compel the attendance of witnesses and the production of papers and accounts. And the result of the adoption of the reform would be that, without sacrificing any of the priceless essentials of the older university life—social, scholastic, hygienic, humane—the direct benefit of these essentials would be extended to a greatly increased circle of students, with a consequential increase of unifying influence throughout the Empire.

Much the same considerations apply to many other and more familiar proposals of educational reform, now long overdue. The equality of opportunity between the sexes (happily to a large extent

realised), the readjustment of teaching to meet the needs and opportunities of adult students, provision for the interchange of teachers (which could be arranged by administrative concordat), the better application of financial resources at present wasted in competitive organisations, the modernisation of curricula to suit variety of age and temperament, the solution of the long-standing dispute between the older universities and the great public schools whereby two years of the average undergraduate's life are practically wasted, a genuine co-operation among the different religious bodies to settle ecclesiastical disputes which still disgrace education—against all these reforms it is possible to produce arguments till the stars appear; but not one of them would survive a genuine attempt at reform by a few men entrusted with real power.

**Law as a Bond of Unity.**—To the statesman of an autocratic Empire, it would appear incredible that unity could be preserved without a uniform system of law; and the truth is, that the mighty concourse of nations which passes by the name of the British Empire is not, in the historical sense, an "Empire" at all, but a vast commonwealth, cemented by freedom instead of being based on authority. It is, in fact, already an unprecedented achievement in political organisation, and, like all novelties, cordially hated by the reactionary type of politician, who would like to re-model it after his own narrow prejudices. Happily, it will not be easy, after the experiences of the war, for such proposals to be seriously entertained; but none the less it would be of the first importance to stimulate such spontaneous tendencies towards uniformity in legal principles as already exist. Of these the work of the Judicial Committee of the Privy Council is the most concrete and conspicuous; and it can hardly be long before the House of Lords, as the Supreme Court of Appeal for the United Kingdom, is merged in the supreme appellate tribunal for the Empire. At present the one substantial difference between the two tribunals, largely identical in composition, is the fact that no conflict of opinions is allowed to appear in the deliverances of the Judicial Committee, while each Law Lord may deliver his own views in the House. The latter practice has, no doubt, its advantages; but they are outweighed by the certainty and weight of the rival method. On the persuasive side of unifying influences may be ranked also the valuable work of the Society of which this Journal is the organ, whose efforts

are capable of almost infinite extension. But a priceless opportunity of consolidating the future of the Empire was lost when the scheme of an Imperial School of Law, so boldly and happily conceived, so near fruition, was wrecked a decade ago, by the prejudices of a bygone age; and it is earnestly to be hoped that one of the consequences of the war may be a revival of that plan. There can be no question of imposing on the Britains beyond the seas a body of law made in the United Kingdom. But it seems not unreasonable to hope that, after a generation of law students had mingled in the halls and class rooms of a central School of Law, lodged within sound of the chimes of Westminster and within a stone's throw of the Royal Courts of Justice—perhaps the greatest storehouse of judicial wisdom in the world—a spontaneous harmonising of the conflicting rules prevailing in different parts of the Empire might begin to manifest itself, and that our children, or at least our grandchildren, might live to see the growth of a majestic system of order and justice, based, not on authority but on reason, covering the world-wide expanse of the Empire, and shining like a sun in the universal heavens. To such a school would resort not only the lawyers but the statesmen, present and future, of the Outer Empire, not only as students but as teachers, each, by friendly argument and exchange of experience, prepared to give to and to receive from his fellow teachers and students those fruits of thought and study destined to build up a Common Law of Empire, which, like the Common Law of England, should be the product of the best minds of the ages working in the school of experience. Then should we have, not indeed an Empire in the old sense, but a World State, based on the loyalty and self-sacrifice of its myriad citizens, and supporting, by free co-operation and fellowship, the ideals of justice and wisdom.

# THE JAPANESE FAMILY COUNCIL.

[*Contributed by* J. E. DE BECKER, ESQ., LL.B.]

IT has been the custom with all families in Japan from time immemorial that a council of friends and relatives should be called, or should come forward voluntarily on their own initiative, to consult together and express their opinions on all matters of importance affecting, to any serious extent, the welfare of the house in which they are interested. Although not legally recognised, the decisions of such assemblies had as great a weight in the community against individuals as if they had the authority of the law to enforce them.

**The Economic Basis.**—The reason was not far to seek, for the interests of individuals must invariably give way to the interests of families or houses in a country like old Japan, where legal ideas and economic conditions had not yet attained that stage of development in which the dignity and rights of individuals are respected as those of men rather than as those of mere members of a house. In Japan, the inseparable association of a man with his family, and his former subordinate relationship to it, may be partly accounted for by the secluded existence of the Japanese for centuries in a small insular country. The essentially agricultural life they have led ever since the foundation of the country—a mode of life which requires a group of men to work in common, and attaches them to the same area of land and so to the same house—and the general poverty of the country, has welded the people into communities.

**The Bond of Relationship.**—Even to-day the importance of the house rather than that of the individual is held in such regard that even where a house possesses an able head, he is not the absolute master ; for in all his acts he is required—morally, if not legally—to conduct himself in such a manner as is not opposed to the wishes or opinions of his relations. The dignity and interests of the houses of relations must be respected as much as his own, and there is, there-

fore, much interdependence and communion of interests among them. In this connection, it may be remarked that relationship in Japan is more in the nature of relationship between houses rather than between persons; and it is partly owing to the desire to perpetuate such relationship between houses that there are very frequent cases of marriage between first and other cousins in Japan, though we must admit that this feature is partly due to the limited opportunity of finding suitable matches for marriageable sons and daughters in this country where no "society" exists, where there are no balls or large social functions or other opportunities for social intercourse.

**The Legal Basis.**—Regarding the family council which has been of such frequent occurrence and exercised so much influence, however, no provisions are to be found in the *Taihō-Ryō* [1] and other ancient laws, perhaps because it has been deemed a matter of course that friends and relations of a house should guard it and assist it with their opinions and deliberation on all important occasions, and also because the family council has generally done its business well and without much abuse. But the growth of individualism, owing to Occidental influence, and the recognised necessity of precisely defining all relations of right and duty, induced the draftsmen of the present Civil Code to provide a special chapter dealing with the family council and regulating its organisation, powers, etc. The most noticeable feature of this chapter is the check it places upon the well-nigh unbounded interference which the relations of docile persons have hitherto exercised over the affairs of their 'houses' and the security which it gives to the free exercise of rights on the part of the head of a house, for, where a head of a house is possessed of full legal capacity, no family council is *legally* recognised, though as a matter of fact it may exercise considerable influence. In short, it secures the assertion of individualism tempered with due consideration for the interests and welfare of families.

**The Constitution.**—A family council, according to the present Civil Code, is a deliberative body organised by relatives of, and persons otherwise connected with, a given person or his house, and having for its object the discussion and decision of important matters relating to the person or the house. There is no necessity for a family council so long as there is a competent head of the house (except

[1] Code of laws promulgated in the first year of the *Taihō* period (701).

when the legal heir to the house is to be disinherited [Art. 975]), nor for an incapacitated person so long as there is a competent father (except when the interests of the one are opposed to the other [Art. 888]). A family council is the highest organ of guardianship; it appoints or removes a guardian and supervisor of guardianship, and appoints a special representative for the ward, etc. (Arts. 900 *et seq.*). It exercises the rights appertaining to the head of a house, when the latter is unable to exercise them himself and there is neither a person exercising parental power over him nor a guardian to do so for him (Art. 751). For the rest, it chooses an heir to a house in certain special cases (Arts. 982–5), gives consent to the disinheritance of a legal heir to a house (Art. 975), gives consent to the marriage or divorce of and the conclusion or dissolution of an adoption by or of a child in place of or together with a step-father, step-mother, or *chakubo* [1] (Arts. 773, 809, 843, 846, and 863), chooses a special representative as regards acts in which the interests of a minor are opposed to those of the person exercising parental power over him (Art. 888), gives consent to the mother of a minor doing certain important acts on behalf of such minor or authorising the latter to do the same (Art. 886), appoints a curator or temporary curator for a quasi-incompetent person (Art. 909). It exercises, in short, the powers usually possessed by a Court of Justice with regard to an incapacitated person.

**Selection of the Members.**—A family council must consist of at least three persons, these being appointed or designated by the Court or a person entitled to designate a guardian. In case the latter person designates members of a family council it must be done by will. When they are chosen by the Court, the latter may exercise its free discretion and choose them from among the relatives of, and other persons connected with, the house or the party concerned. The Court may also permit the applicant (for the calling of a family council) to nominate persons fitted to be its members. All proceedings relating to the organisation and convocation of a family council have to be done in accordance with the Law of Procedure in Non-contentious Matters. A family council being, as a rule, organised each time when there is a matter which requires deliberation, the choice of the members thereof ceases to

[1] A *chakubo* is the wife of the father of a natural child which has been recognised by the father.

be effective as soon as that deliberation is completed ; and forthwith the members of the council lose their capacity as such.

But a family council organised for the benefit of an incapacitated person continues to exist so long as he remains incapacitated. If there is a vacancy in a family council, the remaining members must make application to the Court for the purpose of having the vacancy filled, because otherwise they cannot enter upon any deliberation. There must be at least three members in a family council, but there may be any larger number of members, because there is no maximum limit ; not does it matter whether the number be odd or even. Matters are decided in a family council by a majority vote. When the votes of the members are equally divided, or no resolution can otherwise be arrived at, application is to be made to the Court for a judgment which takes the place of a resolution in a family council. Though a family council is composed of members chosen as described above, the principal party concerned, the head of the house, the father and mother belonging to the same house, the spouse of the principal party concerned, the heads of the principal and branch houses, the guardian, the supervisor of guardianship, and the curator are permitted to state their opinions in a family council, because these persons are all keenly interested in matters to be discussed in such a meeting.

**Refusal to Serve as, and Disqualification to be, Members.**—No member of a family council is allowed to decline to act as such, unless his residence be in a distant place, or he is actually prevented from attending to his duties by reason of sickness, employment as a public functionary or for some other just reason, and the question of whether there is a just reason or not is decided at the sole discretion of the Court. There are two classes of persons who are incapacitated for being members of a family council, namely (1) the guardian, the supervisor of guardianship, or the curator of the incapacitated person in question, and (2) minors, incompetent persons, quasi-incompetent persons, persons who are deprived of public rights, those whose public rights are suspended, legal representatives or curators who have been removed by the Court, bankrupts, persons who have or have had a lawsuit against the ward or the spouse or any lineal blood relative of the ward, persons whose whereabouts are unknown, and persons whom the Court deems to be unfit to perform the functions of a guardian, to have been guilty

of improper conduct or to be addicted to gross profligacy, in short, persons who in their intellectual capacity, in their relative position *vis-à-vis* the principal party concerned, in their social status or in their morals, are deemed by the Court to be unfitted for being members of a family council.

**Responsibility of the Members.**—Members of a family council are required to attend to their duties "with the care of a good manager" because they differ from a guardian or supervisor of guardianship in that they undertake the affairs of another person in the interest of the public.

**Convocation of the Council.**—A family council is convened wherever there is a matter which requires deliberation, and it is convened by a "ruling" (*Kettei*) issued by the Court. It is not, however, convened by the Court of its own motion (*ex officio*), but always on the application of the person principally concerned in the matter requiring deliberation, the head of the house, a relation, the guardian, the supervisor of guardianship, the curator, a public procurator, or any other interested person. For example, a family council called for the purpose of giving consent to the disinheritance of an heir to a house is convened on the application of the ancestor, and it may be on the application of the ward in case the removal of a guardian is what is required. Even a family council for the benefit of an incapacitated person does not constantly sit, but is convened and formed from time to time. Only, such a family council, of which the members continue to be such until the incapacitated person for whom it is organised ceases to be incapacitated, is, except when it is called for the first time, convened not by a "ruling" of the Court, but by the principal party concerned, his or her legal representative, the supervisor of guardianship, the curator, or any member of the council. As to the place where a family council is to be convened, it is not definitely provided by law; but it is convened at the Court itself or at some other place designated by the Court, the latter exercising its discretion according to circumstances, or else it may be determined by consultation among the members themselves. Only, whenever a family council is convened, the fact must, without delay, be notified to the principal party concerned, the head of the house, the father and mother belonging to the same house, the spouse, the heads of the principal and branch houses, the guardian, the supervisor of guardianship, and the curator

**Deliberations of the Council.**—A family council expresses its intention to the outer world by resolutions passed therein, and so the individual intention of each separate member does not constitute the intention of the council. Matters discussed in a family council are decided by a majority of its members; and the intention of a family council may be said to be formed by an agreement of a relative majority of its members. In the event, however, of it being found impossible to arrive at such an agreement, any member may apply to the Court for a ruling which is to take the place of a resolution. With a view to secure that impartiality and disinterestedness with which matters should be discussed and decided in a family council, no member is allowed to vote on a matter under discussion by which his personal interests are affected. Any person who is dissatisfied with a resolution passed by a family council may institute a complaint to the Court. The right of action, however, must be exercised within one month from the date when that resolution was passed (Civil Code, Arts. 944–53).

The constitution of the family council, therefore, though founded upon the ancient custom of Japan, is largely derived, like other features of the Civil Code, from the European codes.

# RECENT MUNICIPAL EXPERIMENTS IN THE UNITED STATES.

## THE GOVERNMENT OF CITIES BY COMMISSIONS AND BY CITY MANAGERS.

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AMERICAN municipal institutions, of one form or another, have now put behind them two and a quarter centuries of history. This history covers a great variety of experiments in local government; there is scarcely a feature of popular administration that has not at some time been tried in one or more cities or towns of the United States. The countries of Europe have not made great changes in their machinery of municipal government during the past half-century; in this field America has been the world's chief laboratory for political experimentation. Though costly, the experiments have been instructive, and have in the end led to notable improvements in the administration of American municipal affairs. The cities of the United States, indeed, taken as a whole, have made greater progress in the direction of efficient and economical administration during the last fifteen years than they were able to make in the preceding fifty. Not all of the advance has been due, of course, to radical changes in the frame of municipal government; the general movement for the reconstruction of local government has had its wholesome reactions upon every phase of civic activity, and has compelled great changes even in the routine of administration.

To appreciate the significance of the changes which have come to pass in the general plan of city government throughout many regions of the American Union within the last decade and a half, one must know something of the developments which preceded these

reconstructions. Let us sketch briefly, therefore, the course of American municipal evolution down to about the year 1900.

**Earlier Municipal Systems in the United States.**—The beginnings of the American municipal system are to be found in the incorporation of the colonial boroughs during the latter half of the seventeenth century. New York was the pioneer, receiving its first borough charter in 1686. Others followed, until on the eve of the American Revolution there were about twenty chartered boroughs in all. These charters were in each case granted by the governor of the colony as the representative of the Crown, the colonial assembly having no authority in the matter. In general, however, all the boroughs were provided with a frame of government which approximated that of the English municipal corporation in the days before the epoch of reform. In each case provision was made for a governing body, to which were given the corporate powers of the community. This governing body, usually styled "the Mayor, Aldermen, and Commonalty" of the borough, consisted of a single council made up of a mayor, a small number of aldermen, and a larger number of councilmen, all sitting together. Except in the three close corporations, Annapolis, Norfolk, and Philadelphia, the councilmen were chosen at regular intervals by popular vote, and so were the aldermen, as a rule; but the mayor was commonly named by the governor of the colony. There were, in addition, some other borough officers, such as the recorder and the treasurer. None of these had to perform burdensome administrative tasks; for the boroughs were small, and provided for their inhabitants no public services of much account.

The successful outcome of the War of Independence and the adoption of the new state constitutions served to bring about great changes in both the form and the spirit of municipal government. Municipal charters were henceforth granted, not by the governor, but by the state legislatures. In other words, the city charter became a statute, which might be amended or repealed like any other statute. This involved a radical change in the relation existing between the municipality and the state. Under the system of royal charters the municipalities enjoyed almost entire freedom from legislative interference; under the new dispensation they were completely under the domination of the state legislature.

**The Principle of "Checks and Balances."**—Some of the boroughs

that had received charters before 1775 abandoned them after the Revolution and received new grants from the legislatures of their respective states. These new municipal charters differed considerably from the old ones. The old idea of the borough as a "close corporation," for instance, was discarded, the new order resting upon the idea that admission to citizenship should be made easy, and that the officials of borough government should be elected. Again, the principle of division of powers, or of checks and balances, which had found recognition in the national Constitution of 1789, and in some of the new state constitutions, now began to find its way into the charters. Indeed it may rightly be said that the dominating feature in American municipal government during the next twenty or thirty years was the influence of the "federal analogy." Borough charters (henceforth usually called city charters) represented the attempt to impose upon the cities a reproduction in miniature of the Constitution of the United States. An excellent example of this procedure may be found in the Baltimore charter of 1796. Here provision was made for the election of the mayor by an electoral college, and for a two-chambered city council, one branch exactly representing the eight wards of the city by giving them two aldermen each, the other representing the citizens at large. Although in the distribution of powers the national model was not exactly followed, the influence of this analogy upon the general make-up of city government is clearly apparent. American municipal development had taken a course of its own, cutting somewhat adrift from earlier English influences.

American students of political science are to-day united in their conviction that this fatuous adoption of Montesquieu's dictum, so far as the groundwork of municipal government is concerned, was unwise in its day and unfortunate in its consequences. Whatever may be urged in favour of the principle of separating legislative and executive powers in national or state governments, that doctrine has no proper place in the government of municipalities. Yet the doctrine did become a fetich, and it determined the main channels of American municipal development for a whole century.

**The Nineteenth-Century Municipal System.**—Under its influence the mayor came to be the executive head of the city, elected directly by the voters. He was usually given a veto power with respect to all by-laws or resolutions of the city council; but the mayoral veto

might be over-ridden by a two-third vote of both branches of the municipal council. The mayor also became possessed of the appointing power, with the right to select and to remove all or nearly all the paid administrative officials of the city, subject to the concurrence of the upper branch of the municipal council. This municipal council might consist of either one or two chambers; in the latter event the upper branch was usually called the Board of Aldermen, while the lower chamber was frequently known as the Common Council. In either case the members were directly elected by popular vote, and where there were both aldermen and councillors they never sat together in one body. This municipal council, whether made up of one or two chambers, formed the legislative organ of local government, with no direct power over the various administrative departments of the city (such as police, water, finance, schools, highways, etc.), either as a body or through its committees.

Add to these two organs, namely the mayor and the council, a varying number of executive officials and boards, some of them appointed by the mayor and responsible to him alone, some elected by the people and responsible to neither the mayor nor the council (as for example a park commissioner, a board of health, a sinking-fund commission, etc.)—put all this complicated machinery together and you have the usual governing equipment of the American city as things were two decades ago. There were local variations of course; but everywhere the broad lines of similarity could be discerned. Starting with the postulate that executive and legislative functions could be sharply differentiated in local government, and that when so separated they should be kept apart in water-tight compartments, the cities of the United States had burdened themselves with a system which diffused responsibility, encouraged friction and proved a great barrier to economical administration.

For more than three decades in the latter half of the nineteenth century the cities of the United States struggled hard against every form of local government with scarcely a gleam of success. And why? Chiefly because most Americans clung to the belief that municipal efficiency was a matter of men, not of methods. "There is not a municipal government in this country on whatever policy organised," wrote the Hon. Carl Schurz in 1894, "which will not work well when administered by honest, public-spirited, capable,

and well-trained men." Reform movements, accordingly, were organised with the simple purpose of putting one party out and the other party in. But when the movements succeeded they availed little. The best of men, when put into municipal office, found that they could accomplish little under a municipal system which parcelled out power in meagre doles among so many authorities.

The striking changes which have come since 1900 embody both a protest and a policy. They are the concrete manifestations of America's protest against the old régime in city administration, with all that is thereby implied, against a governing mechanism so intricate and composed of so many authorities as to be unmanageable by reason of its own sheer weight. But they embody also a policy—the policy of concentrating all powers in local government, legislative and executive powers alike, in the hands of a single, small, elective body of men.

**Beginnings of the Commission System.**—The beginnings of this renaissance were the direct result of a local disaster, the tidal inundation which partly destroyed the city of Galveston, Texas, in 1900. Prior to this time, Galveston had ranked as one of the worst-governed urban communities in the whole country. Under the old system of jurisdiction by a mayor, various elective officials, and a board of aldermen, its municipal history managed to afford illustrations of almost every vice in local government. The city debt was allowed to mount steadily, and borrowing to pay current expenses was not uncommon. City departments were managed wastefully. Professional politicians were put into places of honour and profit in the city's service. The accounts were kept in such a way that few could understand what the financial situation was at any time. The rates were high, and the citizens got poor service in return for generous expenditures. The outcome was that a considerable element among the voters had become discouraged with the whole situation and had ceased to manifest any interest in local affairs.

Affairs were in this condition when, in September 1900, a tidal wave swept in from the Gulf, destroyed about one-third of the city, and put the municipal authorities face to face with the problem of reconstruction. Before the disaster the city's financial condition was rather dubious; now its bonds dropped in value, and it was apparent that funds for the work of putting the city on its feet could not be borrowed except at exorbitant rates of interest. It

happened that much of the real estate in Galveston was held by a comparatively small number of citizens. Some of these, accordingly, went to the legislature of the State of Texas and virtually asked that the city be put into receivership. They requested that the old city government be swept away root and branch, and that for some years, at any rate, all the powers formerly vested in the mayor, aldermen, and subsidiary organs of city government be given to a commission of five business men. This drastic action they urged as a means of saving the city from involvement in grave financial difficulties, if not from actual bankruptcy. Acceding to their request, the legislature passed an Act empowering the governor of Texas to appoint three of the five commissioners, and providing that the other two be elected by the voters of Galveston. A year or two after they had taken office, however, a constitutional difficulty arose. In a matter which came before the Courts it was held that the appointment of city officers by the state authorities was contrary to a provision in the Texan constitution; whereupon the legislature amended its Act by providing that all five members of the Galveston commission should be chosen by popular vote. The same three commissioners who had been holding office under the governor's appointment forthwith stood for election, and were elected by the voters.

**Essentials of the Galveston Experiment.**—As thus amended in 1903, the Galveston charter provides for the popular election, every two years, of five commissioners, one of them to be entitled the mayor-president and all to be chosen at large. The mayor-president is the presiding chairman at all meetings of the commission, but otherwise he has no special powers. The commission, by majority vote, enacts all by-laws and passes all appropriations, the mayor-president voting like his fellow-commissioners. It further supervises the enforcement of its own by-laws and regulates the expenditure of its own appropriations. Likewise it handles all awards of contracts for public works. In a word, it exercises all the powers formerly vested in the mayor, board of aldermen, and other officials, acting either singly or by concurrence. The commissioners, by majority vote, apportion among themselves the headships of the four administrative departments into which the business of the city is grouped—namely, the departments of finance and revenue, water and sewerage, police and fire protection, and streets and

public property. The mayor-president is not assigned to the head of any one department, but is supposed to exercise a co-ordinating supervision over them all. Each of the commissioners is thus directly responsible for the routine direction of one important branch of the city's business. Appointments of permanent officials in each department are not made by the commissioner who is in direct charge, but by vote of the whole commission. Minor appointments are, however, left to the commissioner in whose department they may happen to fall.

It should be remembered that the Galveston plan was not at first intended to be a permanent system of government for the city. Its prime object was to enable Galveston to tide over a difficult emergency. Prepared somewhat hastily, with very little experience to serve as a guide, it vested in the hands of a small body of men more extensive final powers than most cities would care to give away; but the lapse of a few years proved that the new system was a godsend to the stricken community. The people's civic spirit was aroused, the business of the city recovered rapidly, and in a remarkably short time the place was again on its feet, financially and otherwise. Then developed the conviction that commission government was a good form to maintain permanently. The other cities of Texas, noting conditions under the new charter in Galveston, came forward and asked the legislature for similar legislation; and in the course of a few years the new plan of local government was authorised for use by general Act in all the cities of the state.

This development naturally attracted attention in other parts of the country, and the reform organisations of various northern cities began to discuss the possibility of applying the scheme to the solution of their own municipal problems. The first municipality outside of Texas to accept the plan was Des Moines, the capital city of Iowa. In 1907 the Iowa legislature passed an Act permitting any city of the state having a population of more than 25,000 to adopt a commission type of government; and forthwith the citizens of Des Moines, by whom the Act had originally been brought forward and urged, took advantage of the new provision.

**Improvements made by Des Moines.**—The Des Moines plan of government by commission is simply a new edition of the Galveston plan, similar in outline, but embodying some novel features. In brief, it provides for a commission consisting of a mayor and four

councillors, all elected at large for a two-year term by the voters of the city. To this body is entrusted all the powers hitherto vested in the mayor, city council, board of public works, park commissioners, boards of police and fire commissioners, board of waterworks trustees, board of library trustees, solicitor, assessor, treasurer, auditor, city engineer, and all other administrative boards or officers. Under the Des Moines plan the business of the city is grouped into five departments, namely, public affairs, accounts and finances, public safety, streets and public improvements, and parks and public property. By the terms of the charter the commissioner who is elected mayor of the city becomes head of the department of public affairs; each of the other commissioners is put at the head of one of the other departments by majority vote of the commission, or council, as the body is called in Iowa. All officers and employees of the various departments are appointed by the council, which also has authority to choose a board of three civil service commissioners to administer, under its direction, the state laws relating to the civil service. Most of the city officers come within the scope of these laws.

Thus far the system diverges but very slightly from the Galveston plan. The chief difference lies in the fact that the Des Moines scheme incorporates what are commonly termed the newer agencies of American democracy, namely, the initiative, referendum, and recall. The initiative is the right of 25 per cent. of the qualified voters of the city to present to the council by petition any proper by-law or resolution, and to require, if such be not passed by the council, that it be submitted without alteration to the voters by referendum. If at such referendum it receives a majority of votes, it becomes effective. Or if the council should pass, of its own volition, any such measure (except an emergency measure), it cannot go into effect until ten days after its passage. Meanwhile, if a petition protesting against such by-law, signed by 25 per cent. of the voters of the city, is presented to the council, it is incumbent on that body to reconsider the matter. If the by-law is not entirely repealed, it must then be submitted to the voters for their acceptance or rejection. The vote takes place at a regular election, if there is one within six months; otherwise at a special election held for the purpose. If endorsed at the polls, the measure becomes effective at once; if rejected by the voters, it remains inoperative.

The recall provision permits the voters to remove from office any member of the council at any time after three months' tenure in office. Petitions for recall or removal must be signed by at least 20 per cent. of the voters, and the question of recalling, or in other words forthwith ending the term of a councillor, is put before them at a special election.

**Rapid Spread of the Commission System.**—Since its adoption in Des Moines the spread of the revised commission system has been rapid. In the words of the politicians, it has "spread like wildfire." I have never seen wildfire spread, but if it goes so far and so fast as the commission plan of municipal government in so short a time, it must travel very rapidly indeed. During the next four years a great many cities, scattered about in more than twenty different states, abolished the old system and established the new one. Some of these were large cities, but in general the commission plan seemed to appeal more strongly to the smaller urban centres. A list of the cities that have the system at the present day would contain the names of more than three hundred municipalities. Six are cities with populations exceeding 200,000 (including Buffalo and New Orleans); fourteen are cities with populations of 100,000 or over. The others, ranging from a few thousand upwards, are scattered in all parts of the United States from the Atlantic to the Pacific and from the Canadian to the Mexican border. Nor has the process of extension yet come to an end.[1]

**Merits of the Commission Plan.**—Now as to what the cities have gained by reason of this radical reconstruction in their frame of government. In its actual working the new system has shown itself possessed of many advantages. Of these the most striking one, of course, arises from the fact that the plan puts an end to that intolerable scattering of powers, duties, and responsibilities which the old

[1] It should be explained that only a few of the American states have general Municipal Corporations Acts. For the most part cities get their system of government either by special statute or by permissive general laws, which allow each municipality to adopt such form as their respective voters may determine. The twenty-five most important cities now having commission government are as follows: Birmingham, Ala., Berkeley and Oakland, Calif., Des Moines, Ia., Kansas City and Wichita, Kan., New Orleans, La., Lowell and Lynn, Mass., St. Paul, Minn., Omaha, Neb., Jersey City and Trenton, N.J., Buffalo, N.Y., Oklahoma City, Okla., Portland, Ore., Harrisburg and Reading, Pa., Memphis, Tenn., Dallas, Houston and San Antonio, Texas, Salt Lake City, Utah, Spokane and Tacoma, Wash. Some Canadian cities have also adopted the plan; for example, St. John, N.B., and Lethbridge, Alberta.

type of city government promoted to the point of absurdity. By enabling public attention to focus itself upon a narrow and well-defined area, it allows the scrutiny which voters apply to the conduct of their representatives to be real, and not, as heretofore, merely perfunctory. The system does not guarantee that a city's administration shall be always free from good ground for criticism—no system can do that; but it does guarantee that, when the administration is faulty, there shall be definite shoulders upon which to lay the blame. Under the commission plan the responsibility cannot be bandied back and forth in shuttlecock fashion from mayor to council and from the council to some administrative board or officer. Issues cannot be clouded by shifty deals among several authorities. In thus eliminating a chaos of checks and balances, another name for which is friction, confusion, and irresponsibility, the new framework removes from the government of American cities a feature which, to say the least, has in practice been unprofitable from first to last. Advocates of city government by commission have been in the habit of saying their plan would give cities a business administration. They pointed out that a city's affairs are of the nature of business, not of government. Go through the records of a city-council meeting and catalogue the items that can be classed as legislation; the list will be very short indeed. By far the greater part of a council's proceedings have to do with matters of routine administration, which differ slightly, if at all, from the ordinary operations of any large business concern. Now no business organisation could reasonably hope to keep itself out of insolvency if it had to do its work with any such clumsy and complicated machinery as that which most American cities have had imposed upon them. What would be thought of a business corporation that entrusted the conduct of its affairs to a twin board of directors (one board representing the stockholders at large and the other representing them by districts), and gave to an independently chosen manager some sort of veto power over them, besides subjecting his appointments to their concurrence? It is, of course, quite true that a city is something more than a profit-seeking business enterprise. The affairs of the municipality cannot be conducted in defiance of public opinion, or even in disregard of it; whereas business management may or may not bend to popular pressure, as it may deem expedient—and expediency is here another word for

profitableness. Any system of government that from its very nature must yield to every passing gust of popular sentiment carries a serious handicap. To measure it in terms of economy or efficiency with private business management is therefore unfair, unless large allowances be made. It should never be forgotten that a city must give its people the sort of administration they want, and that this is not always synonymous with what is best or cheapest.

The system of government by commission has enabled the authorities of the city to conduct business more promptly and with less friction. There may be wisdom in a multitude of counsellors, but the history of those municipalities which maintain large deliberative bodies seems to warrant the impression that this collective wisdom is not of very high grade. Unwieldy councils have been put upon American cities under the delusion that democracy somehow associates itself with unwieldiness. There is a notion in the minds of all democracies, and it is as deep-seated as it is illusive, that a body cannot be representative unless it is large to the pitch of uselessness for any effective action. Even deliberative bodies however, reach a point of diminishing returns, and American municipal experience seems to show that this point is not fixed very high. Large city councils in the United States have everywhere been found to be ill adapted to the work which they are expected to do. To say that they display greater regard for the interests of the people, or more conservative judgment in the handling of questions of policy, than do small councils of five, seven, or nine men is to disregard what every one can see with his naked eyes. The history of large councils, whether in New York, Philadelphia, Boston or in the smaller cities, is little more than a record of political manœuvring and factional intriguery, with a mastery of nothing but the art of wasting time and money. A council of some half-dozen men offers at least the possibility of despatch in the handling of city affairs; for its small size removes an incentive to fruitless debate, and affords little opportunity for resort to subterfuges in procedure.

But the chief merit urged in behalf of the commission plan is not that it concentrates responsibility and permits the application of business methods to the conduct of a city's affairs, important as these things are. In the last analysis, municipal administration is as much a question of men as of measures. Tocqueville once

said that in his time the men of Massachusetts could prosper under any sort of constitution; and even to-day the boroughs of England manage to secure efficient and economical administration under a system that impresses the American student of affairs as being splendidly designed to promote inharmony and extravagance. Efficiency in city administration may be assisted by one form of local government or retarded by another, but in the long run it is not less a question of personnel than political framework. Much depends, accordingly, upon the answer to the query whether the commission form of government does or does not offer any assurance, or even a reasonable prospect, that it will tend to instal better men in the city's posts of power and responsibility. This is, after all, the crucial question.

Fifteen years of experience with the commission plan have at least demonstrated the folly of *a priori* reasoning upon such a question. In the early days of the commission propaganda we were assured that the new plan could not fail to bring us a higher grade of councilmen or commissioners. "Concentrate power," it was said, "and you will get men worthy to exercise it. But when power is scattered among many officers of government, no more of it is likely to fall to the share of each one than might quite safely be entrusted to a man of mediocre ability; and when authority can safely be given over to men of this type it almost certainly will be. Men of little experience and less capacity have found it easy to get themselves elected to membership in large city councils, for the reason that their presence there could, even at the worst, do little harm, owing to the numerous statutory checks put upon the council's power. When membership in a city council means the exercise of no more than one seventy-fifth part of less than one-third of a city's jurisdiction, it is not surprising that the post of councillor appeals only to men whose standing in the community is negligible. If, on the other hand, all municipal authority can be massed in the hands of five men, each of these individuals has an opportunity to become a real power in the community, which is the only motive that will draw capable men to the council-board."

That was the line which predictions usually took a dozen years ago. Have the predictions been fulfilled? On the whole they have not. A tabulation of the commissioners who now hold office in twenty important cities taken at random shows that more than

three-fifths of them are men who were either councillors or aldermen or city officials in their respective cities before the change to commission government was made. This creates at least a reasonable presumption that the commission plan has not revolutionised the personnel of American city government. What has actually happened is not the drawing of new men into the municipal service, but the retention of the best among the old groups and the giving to them a better chance to achieve satisfactory results. It is, at any rate, the testimony of those who have served under both the old plan and the new that the latter gives greater opportunity and greater incentive; and it is the experience of those cities which have been under commission arrangements for several years that, whatever may have been the effect upon the personnel of the administration, the change has had a salutary influence upon the whole tone of municipal affairs. The evidence on this point is too extensive, and comes from too many authoritative sources, to be questioned.

Perhaps the most convincing proofs are those gathered by the United States Bureau of the Census and published by it in 1916. The figures relate to rates, expenditures, and loans in various cities both before and after the adoption of the commission plan. Likewise there is a comparison of annual financial statements from typical cities, some with the new form of government and some with the old. The figures leave no doubt that the new plan has had a favourable reaction on rates and borrowing. Nor do the statistics tell the whole story. The improvement in the general tone and temper of municipal government is something which counts for much, even though it cannot be set down on a balance sheet.

**Objections to Commission Government.**—But even though the financial results seem favourable, there are those who continue their objection to the commission plan upon political grounds. According to these opponents, it is based upon a wrong principle and proposes a dangerous policy; and it is accordingly branded as oligarchical, undemocratic, and un-American. Under such designations, however, it merely shares company with almost every other practical scheme for the improvement of municipal administration that has come before the American public during the last quarter-century. To urge that because a governing body is small it must inevitably prove to be bureaucratic in its methods and unresponsive

in its attitude, is merely to afford a typical illustration of politicians' logic. Whether a public official or a body of officials will become oligarchical in temper depends not upon mere numbers, but upon the directness of the control which the voters are able to exercise over those whom they put into office. And effectiveness of control hinges largely upon such matters as the concentration of responsibility for official acts, an adequate degree of publicity, and the elimination of such features as national party designations attached to the names of candidates on the municipal ballots, a practice which has always served in the United States to confuse the issues presented to the voters at the polls. In fact, it might almost be laid down as an axiom deducible from American municipal experience that the smaller an elective body the more thorough its accountability to the electorate. If one brushes away the shallow sophistry of those who urge the retention of a large city council as a means of ensuring responsibility to popular sentiment, and regards only the outstanding facts in a half-century of American municipal history, one sees pretty readily that the supporters of the old order are urging a high premium on mediocrity in public office, a continuance of the vice of sectionalism in city administration, and an arrangement under which responsibility directs itself to a few political bosses rather than to the whole municipal electorate.

Commission government, we are told by those who have been and are still opposing it, is inadequately representative; five men, chosen at large, cannot represent the varied interests, political, geographical, racial, and economic, in any large municipality. If it be true that in the conduct of his local affairs a voter cannot be adequately represented except by one of his own neighbourhood, race, religion, politics, and business interests, then this criticism is entirely reasonable. But is this not the *reductio ad absurdum* of the representative principle? Would not a recognition of this doctrine absolutely preclude all chance of securing a municipal administration loyal to the best interests of the city as a whole, and reduce every issue to a *mêlée* of sectional and personal prejudices? It has been frequently proved in the United States that a single official, like the president of the nation or the governor of a state or the mayor of a city, may more truly represent popular opinion than does a whole congress or state legislature or municipal council. Popular sentiment is not difficult to ascertain when a public officer

takes the trouble to ascertain it. Five men can do it quite as well as fifty, and they are much more likely to try.

"It is almost a maxim that the smaller the body, the easier can it be reached and influenced." Thus runs the gist of an argument commonly advanced by the opponents of the commission plan. In other words, it is easier for companies holding concessions, or for the publicans, or for the mere seekers after loaves and fishes in city administration, to corrupt or coerce five councillors than fifty; hence, there is safety in numbers. The trouble with this argument is, however, that it rests upon a false presumption. It assumes that sinister influences exert themselves directly upon the councillors one by one, and hence that, where a large council exists, the forces of corruption or coercion must deal with a large body of men. That this is not the case, however, every one who has had anything to do with municipal politics knows very well. Large councils in this country have been, for the most part, made up of men who owed their nomination and election to political leaders to whom the councillors have been under permanent obligations, and from whom they have taken their orders. A few bosses, sometimes a single boss, can control a majority of the council, and can deliver the necessary votes to any proposition when the proper incentive appears. Companies or contractors who wish to get what they are not entitled to have do not approach the council through its members one by one. They have always dealt with the middleman—that is to say, with the political leader, who controls the votes of councilmen. Accordingly, they have had to do with perhaps five men, not with fifty, and, what is more, with five men who have power without responsibility, who were not invested with authority by the voters, and are consequently not accountable to them for the abuse of it. Under commission government, on the contrary, a favour-seeking private interest has had to deal not with a few middlemen, who have the votes of others to deliver, but with five men who are free to act as they think best and who act with the eyes of the voters upon them. A small council or commission means concentration of power, but it also means centralisation of responsibility. A large council means an equal concentration of power, but of power that too often is not so much in the hands of the councilmen as in those of a few outside political bosses who are in a position to dictate what the council shall or shall not do—men who have the

power without the responsibility. Centralisation of power there will be in any case, and must be if business is to be conducted with promptness and efficiency. No matter what the frame of city government may be, the dominating influences are pretty sure to gravitate into the hands of a few men.

The issue as between a large and a small council hangs, in the main, on the simple question whether these few men shall be chosen directly by the voters at large, and be directly responsible to them, or whether they shall be political manipulators without any direct responsibility. Philadelphia has a municipal legislature which comprises, in both its branches, 132 members; yet there is no city in the United States in which company interests, working through a small group of political henchmen, have so completely and so consistently dominated the city council's attitude upon questions of concession-granting policy. It is not in the size of its municipal council that the American city may reasonably hope to find assurance against malfeasance in the management of its affairs, against the bartering away of valuable concessions for inadequate returns, against the subordination of the public welfare to private avarice. Its safety lies rather in the size of the men who compose the council. There is more security in five men of adequate calibre, working in the full glare of publicity and directly accountable to the people of the whole city, than in ten times as many men of the type usually found in the ranks of our large municipal councils.

Objections have been urged against commission government on the ground that it puts into the hands of a single small body of men the power both to appropriate and to spend public money. Such an arrangement, it is said, and said truly, violates an established principle of American government, which demands that in the interest of economy and honesty these two powers should be lodged in separate hands. In keeping with this dogma, Congress appropriates money for the general expenses of national government, but the executive disburses the funds so appropriated. The state legislatures make appropriations, but the state executives apply the funds as directed.

From this traditional division of powers the commission system makes a radical departure. It commits to a single board the power of fixing the annual rates, of appropriating the revenues to the different departments, and of supervising the detailed expenditure

of the funds so apportioned. Novel as this plan is, it is not necessarily either dangerous or objectionable on that account. Many novel features have come into American governmental methods within comparatively recent years, and all have had to meet the cry that they involved departure from the time-honoured way of doing things in this country. Moreover, the fusion of appropriating and spending powers in the organisation of city government is not unprecedented. This very principle is at the foundation of the English municipal system; and, as the world knows, it has proved in operation neither a source of corruption nor an incentive to extravagance. Furthermore, those American cities which have had the commission form of government for ten years or more find nothing objectionable in this blending of the two powers; on the contrary, their experience with it seems to indicate that it possesses some important advantages over the old plan of separation. It appears to inspire greater care in making the estimates and to promote greater success in keeping within them when made. Under its influence commission budgets are, so far as recent experience goes, framed with a fairer regard for the interests of the whole city than council budgets have usually been, and commissions have unquestionably not proved to be less capable in handling expenditures than were the unco-ordinated executive boards and officials that formerly had charge of such work. The indictment of commission government on this score is not supported by experience. It is a sentimental objection, worth no more than such objections usually are.

A much more substantial objection to the commission plan arises from the fact that it practically abolishes the office of mayor, that it does not provide an apex for the pyramid of local administration. Now, the mayoralty is a post that has established a fair tradition in America, and there is a rational function for it to perform. It stands in the public imagination as the one municipal office in which all administrative responsibility can be centralised. To lodge all such power and responsibility in the hands of five men is better than to put it in the hands of fifty; but to place most of it in the hands of one man, duly surrounded by the necessary safeguards, is better still. Nearly all the arguments that can be advanced in favour of the five-headed executive can be urged with greater cogency for the policy of concentrating all final powers of an

administrative character in the mayor alone. The commission without a mayor is apt to act like a machine without a balance-wheel.

It is here, in fact, that an important shortcoming of the commission plan has disclosed itself. The plan claims to concentrate responsibility for every administrative act; but in practice it has not done so. The commissioner who is immediately in charge of the police or highways or public health finds himself frequently over-ruled by his four colleagues. Jealousy among the five commissioners has often led to friction and working at cross-purposes. There has been too much evidence of a disposition to "play politics," that is to say, too much readiness on the part of the individual commissioner to popularise himself with his constituents even when by so doing the general interests of the city are likely to suffer.

But even more serious as a defect of the commission plan, as shown by ten years of experience, is its failure to make full use of expert service in handling the regular work of the city. The commissioner who, on election, takes general charge of some branch of the city's business (such as police and fire protection, or water and light) is a layman, unskilled in the problems of his new department. But he draws a good stipend and naturally desires to make at least a pretence of earning it. The consequence is that he becomes too busy with the matters which are under his direction, often hampering the skilled efforts of the permanent officials such as the chief of police (chief constable) or fire chief or engineer of the water service, ordering things about as political motives or as a desire to secure his own re-election may dictate. The result is that the officials disclaim responsibility, often lose enthusiasm, or sometimes resign and are replaced by more pliable subordinates.

Now the commission plan did not at its inception contemplate that development. It assumed that the five commissioners, not being expert themselves, would be guided by expert advice. But in the great majority of commission-governed cities (that is to say, cities with 50,000 population or less) there is hardly room for two well-paid men at or near the head of each division of work. The ratepayers do not feel like paying a Commissioner of Public Safety an annual salary of £500 or more, and also providing full-salaried officials at the head of the police and fire protection services. The tendency has been, with political motives in play, to pay the commissioners more and the officials less. The result is that in many

cases the professional's part in administration has been curtailed, while the elective commissioner, although not qualified by training to do so, has assumed technical functions.

**The City-Manager Arrangement.**—It is with a view to improving the commission plan, and particularly with the aim to eliminate this last-named defect, that the policy of employing a city-manager has been adopted by a number of American cities. Contrary to the impression which seems to exist abroad, the city-manager plan is not a new scheme of local government, but merely a variation of the commission system, designed to secure a more effective concentration of administrative functions in the hands of a professional well-paid expert, removing from the elective commissioners the power to interfere with the details of municipal business. The first city to try an experiment along this line was Dayton, Ohio, where the new arrangement went into effect on January 1, 1914. Since that date the example has been followed by a score of other municipalities, and additions to the list are being rapidly made at the present time.

According to the Dayton plan an elective commission of five members controls all branches of the city's affairs, legislative and administrative, except the schools, which are under a separate board. The members of the commission are chosen by popular vote for a four-year term, but are subject to recall by an adverse vote at any time after six months of service. The commission, by majority action, passes the by-laws and fixes the rates. But it does not directly have anything to do with the actual management of the various departments, nor does it immediately supervise the work of the officials. These responsibilities it delegates to a high official with the title of city manager, appointed by the commission to hold office during its pleasure and paid a large stipend.

Now as to the city manager's duties. They are fourfold. First of all, in an advisory capacity he attends all meetings of the commission, with the right to be heard and to make recommendations, but not to vote. Secondly, he is the enforcer of all by-laws. In the third place he appoints all other city officials and employees, subject, however, to the civil service regulations, and may suspend or dismiss any of them for proper cause. In this connection he assigns to each official the sphere of work to be done. And, finally, he prepares the annual estimates, submitting them to the commission for action and he is the general supervisor of all the work done in the various

departments and offices, having charge of contracts, the purchase of supplies and so forth, the details being handled by his subordinates. He is, in a word, the general manager of the corporation.

So far as one may judge from less than three years' experience the city-managership forms a highly valuable, if not an indispensable, adjunct to the commission plan of government. It strengthens the latter at its weakest point by ensuring a high grade of professional skill at the apex of the city's administrative service. As for the future much will depend upon two things: in the first place upon whether cities find it possible to get the right sort of men for managerial positions, and in the second place upon whether the position can be kept out of the vicious circle of political patronage. These are questions for the next ten years to answer.

A word in conclusion. America has not yet reached a final solution of those problems of municipal government which seemed to constitute during the latter half of the nineteenth century the most vexing of all the problems of the Republic. But at any rate notable progress has been made. Old theories have been discarded; obsolete political mechanism has been relegated to the scrap-heap. New theories and institutions are being given a fair trial. With this has come an awakened interest in municipal affairs, and things which were not intelligible to the electorate because of the elaboration of municipal checks and balances have become intelligible now. Thirty years ago Lord Bryce, in the ablest and most discriminating book that has ever been written about the political institutions of the United States, could rightly point to the government of our cities as the "one conspicuous failure" of the American commonwealth. Lord Bryce would not find reason to say the same thing to-day.

Before the average American city becomes a model of efficiency and thrift, a great deal more remains to be done. From time to time the rings and bosses may get control of some large city as they managed to do in times gone by. But even that would not now spell disaster. Frenchmen said of the Bourbon Restoration in 1814 that it brought back the old dynasty but not the old régime. So, too, the stalwarts of Tammany and of similar organisations throughout the land may come back to a fleeting lease of power, but the system which gave them a strangle-hold on the municipal treasury is gone, and gone for ever.

# COMPANY LAW IN THE EMPIRE.

[*Contributed by* JAMES EDWARD HOGG, ESQ.]

THE law relating to joint stock trading companies is a branch of commercial law which it is generally thought might with advantage and ease have been made fairly uniform throughout the Empire—particularly after the passing of the Companies (Consolidation) Act, 1908, in the United Kingdom. An examination of the various oversea statute books, however, is not encouraging from this point of view, and the present rate of progress towards uniformity is very slow.

**Possessions without Company Law.**—The law of joint stock trading companies is of course almost entirely statutory, and the Companies Act, 1862, has for the most part been the foundation of the oversea legislation. There are, however, parts of the British dominions which have not adopted the Act of 1862. Bermuda is an instance of an important Crown Colony which has no Companies Act, local requirements being apparently satisfied by the Limited Partnership Act, 1883. Gibraltar also seems to have no Companies Act. Other jurisdictions might be added, in which the common law is not in force, such as Malta, the Seychelles, Cyprus, and Egypt.

**The Canadian Law.**—The Companies Acts of the Dominion and some of the Provinces of Canada are not framed entirely on the model of the English Act of 1862 and its amendments. One difference between the English type and this Canadian model is of considerable importance. The method of incorporation adopted in the English statute is that the prescribed number of persons, on signing a memorandum and having this duly registered, become at once a body corporate. The Canadian method, in the statutes referred to, is that the prescribed number of persons apply for letters-patent, and it is these letters-patent issued under the great seal of the Dominion or a Province (as the case may be) that constitute the

applicants a body corporate. In one case the corporate body is created by the statute itself, in the other by the letters-patent. The corporation thus brought into existence by letters-patent under the great seal is not a statutory corporation in the sense in which that expression applies to the corporation that is created by registration of a memorandum. The statutory corporation is restricted in its operations to its avowed objects under the doctrine of *ultra vires*; the non-statutory or "charter" corporation is not so restricted.[1] This distinction has recently been recognised in Canada as having great practical importance, and the whole system of company law in Canada has been thrown into some confusion for the time being. Whilst, on the one hand, the legislative authorities show an inclination towards favouring the "charter" system by reason of the greater freedom enjoyed under it by Provincial companies—particularly with respect to extra-provincial business—it is felt by commercial men that a trading company should not be allowed to escape from the control of the *ultra vires* doctrine imposed by the purely statutory system. As this peculiarity of Canada throws a special obstacle (apart from other differences) in the way of uniformity in company law throughout the Empire, it is necessary to refer more specially than would otherwise have been necessary to the statutes of Canada, both Dominion and Provincial.

**Variations in the Canadian Provinces.**—Under the Dominion statute [2] and in Ontario,[3] Quebec,[4] New Brunswick,[5] and Manitoba,[6] incorporation is effected by a grant of letters-patent under the great seal—the "charter" system. In Nova Scotia,[7] Prince Edward Island,[8] Saskatchewan,[9] Alberta,[10] British Columbia,[11] and the Yukon

[1] *Bonanza Creek G.M. Co.* v. *Rex* [1916], 1 A.C. 566.

[2] Rev. St. Canada, 1906, c. 79; amended in 1908 (c. 16), and in 1914 (c. 23).

[3] Rev. St. Ontario, 1914, c. 178 and c. 179; amended in 1915 (c. 20, s. 18), and in 1916 (c. 35, s. 6).

[4] Rev. St. Quebec, 1909, Arts. 6002–6110, with some amendments.

[5] New Brunswick Companies Act, 1916 (c. 14).

[6] Rev. St. Manitoba, 1913, c. 35; amended in 1913–14, cc. 22, 23.

[7] Rev. St. Nova Scotia, 1900, c. 128, with amending Acts in nearly every succeeding year; Domestic Dominion and Foreign Corporations Act, 1912 (c. 15).

[8] Companies Act, 1915 (c. 14).

[9] Companies Act, 1915 (c. 14), amended in 1916 (c. 37, s. 40).

[10] Companies Ordinance (of the North-West Territories), 1901, c. 20, with amendments by the Alberta Legislature in nearly every year from 1906 to the present year, the last being (1916, c. 26), "An Act respecting the capacity of Companies."

[11] Rev. St. British Columbia, 1911, c. 39, with amending Acts in every succeeding year.

Territory,[1] incorporation is effected by registration of a memorandum as in England. In other respects also the Nova Scotia, Saskatchewan, and Alberta statutes have adopted provisions from the English Companies Acts, 1862–1907, whilst the existing Prince Edward Island, British Columbia, and Yukon statutes are based upon the English Acts of 1908 and 1913.[2] In Alberta, however, it was enacted in 1916—by the Act "respecting the capacity of companies"—that companies incorporated in the Province are to have the capacity of a natural person as regards the exercise of extra-provincial powers, and that the incorporation is to have the same effect as if the companies had been "incorporated by letters-patent under the great seal." To the same effect is the Ontario amendment of 1916, which confers on "every corporation or company" incorporated in the Province "the general capacity which the common law ordinarily attaches to corporations created by charter." These two amending enactments show how strong in some of the Provinces of Canada is the preference for the "charter" type of trading company.

**Adoption of English Law.**—Apart from Canada, those of the oversea dominions that had, before 1908, enacted statutes dealing with joint stock trading companies followed the English Act of 1862 and its amendments with a fair degree of uniformity, the differences consisting mainly of the presence or absence of particular amending enactments. In a few cases Companies Acts were adopted *in globo* by a short enactment declaring the statutes of the United Kingdom or some oversea dominion to be in force. Thus, in Sierra Leone a local statute adopted in this way the Companies Acts which were "in force in England at the commencement of" the local statute.[3] The Falkland Islands, indeed, went further, and adopted "all laws, rules, and regulations for the time being in force" on the subject in the United Kingdom.[4] The Indian Companies Acts, 1882–1900, were in the same way adopted *in globo* by East Africa[5] and Uganda.[6]

[1] Consol. Ordin. Yukon, 1914, No. 18.

[2] Companies (Consolidation) Act, 1908 (8 Ed. VII. c. 69); Companies Act, 1913 (3 & 4 Geo. V. c. 25).

Companies Ordinance, 1906 (No. 3).

[4] Companies Ordinance, 1898 (No. 8).

[5] Ordinance, 1903, No. 10, "Companies."

[6] Uganda Companies Ordinance, 1905 (No. 12).

**Development of Legislation since 1907.**—In 1907 a return was prepared for the Imperial Conference showing the likenesses and differences in the company law of the United Kingdom and the oversea Dominions.[1] This blue book deals with the various Companies Acts from 1862 to 1907 of the United Kingdom, India, Canada, Australia, New Zealand, and South Africa (including Southern Rhodesia). Newfoundland is not included, nor is any other of the Crown Colonies or Protectorates. In several of the jurisdictions dealt with the statutes as they stood in 1907 have been revised or consolidated, but the information given in the Blue Book is still useful as showing in a compendious form the extraordinary differences in detail that exist in the various jurisdictions. The seventeen statutes of the United Kingdom have been swept away by the Act of 1908. Canada, Australia, and South Africa remain nearly where they were as regards the perplexing number of company statutes; the revision of some statutes is balanced by the entry of new jurisdictions into the field of company legislation—in Canada the Provinces of Alberta and Saskatchewan and the Territory of Yukon, and in Australia the Territory of Papua. In these three great self-governing Dominions, only five jurisdictions have taken the opportunity of revising their company law on the model of the English Act of 1908—British Columbia, Prince Edward Island, and Yukon in Canada, Victoria in Australia, Transvaal in South Africa. India has fallen into line, as well as nine Crown Colonies—Straits Settlements, Hong-Kong, Fiji, Mauritius, British Honduras, British Guiana, Trinidad and Tobago, Barbados, Southern Nigeria.

In all these fifteen jurisdictions but one, the local statute is more or less a transcript of the Companies (Consolidation) Act, 1908, and the Amending Act of 1913, with alterations, omissions, and additions suitable for local requirements in each case. The exception is British Honduras, and here the local statute simply declares the two English Acts " to be in force in the colony," being " read and construed " as provided by another local enactment relating to the " application of English Law." [2]

**Modifications in Adoption of English Law.**—The differences in the adaptation of the English Acts of 1908 and 1913 by the local

[1] *Company Laws of the British Empire.* Cd. 3589. Price 6*d.* 1907.

[2] Consolidated Laws of British Honduras, 1914, c. 149, " of Companies."

statutes of British Columbia,[1] Prince Edward Island,[2] and Yukon[3] are mostly due to difference of local conditions. There are already five amending Acts in British Columbia, relating for the most part to extra-provincial companies, registration of mortgages, trust companies, land companies, mining companies, and other local peculiarities. These local additions are absent from the Prince Edward Island statute, but present to some extent in the Yukon statute. The Yukon statute has a feature of its own, viz. provisions relating to public utility companies and their special privileges; it seems to be assumed that such companies will be created by letters-patent. Other points of divergence from the English model are common to all three jurisdictions. Thus, companies are not to be incorporated under these statutes for railway construction, banking, or insurance business; the minimum number of persons who can form a company is five for a public company; the English provisions as to associations not for profit holding land by special licence, etc. (ss. 19, 20 of 1908 Act) are omitted; the English provisions as to colonial registers (ss. 34–36 of 1908 Act) are omitted. In particular, the provisions of the English Acts are followed on the following important points: private companies, annual balance-sheets, and permission to make directors' liability unlimited.

**Victorian Consolidation Act.**—In Victoria the local statutes were consolidated and amended in 1910,[4] and a considerable part of the amendment consisted in introducing provisions taken from the English Act of 1908, so that the latter was in effect adapted with local alterations. The Act of 1910 now stands as Part I. of a consolidating statute of 1915,[5] ss. 1–294 of the latter being merely a re-enactment of the Act of 1910. The minimum number of persons who can form a company is five for a public company; the English "private company" becomes a "proprietary company," but the word "proprietary" must form part of the company's name. The English provision as to non-profit associations holding land by special licence (s. 19 of the 1908 Act) is omitted. From the enact-

[1] Rev. St. British Columbia, 1911, c. 39, and amending Acts in every succeeding year to the present year.
[2] Companies Act, 1915 (c. 14).
[3] Consol. Ordin. Yukon, 1914, No. 18.
[4] Companies Act, 1910 (No. 2293).
[5] Companies Act, 1915 (No. 2631).

ment (s. 33) corresponding with s. 26 of the English Act of 1908, the important sub-section (sub.-s. 3) relating to the balance-sheet is omitted, but specially stringent provisions as to keeping books and preparing an annual balance-sheet are inserted in a later part of the Victorian Act (s. 115). Branch registers may be kept in "any country, state, or colony." The provisions of the English Act as to companies incorporated outside the United Kingdom (ss. 274, 275 of the 1908 Act) are adapted by ss. 270, 271 of the Victorian Act; so as to directors' unlimited liability and liability of banks on their note issue (ss. 60, 61, 251 of English Act), which are dealt with in ss. 67, 68, 245 of the Victorian Act. Other provisions not in the English Acts relate to the following matters: prohibition against a company dealing with its own shares, and against a bank making advances to its own officers, payment of dividends out of profits only, restrictions on the use of the word "bank" and certain other words.

**Transvaal.**—In the Transvaal [1] a statute modelled on the English Act of 1908 was enacted just before the Union of South Africa was set up, and, pending Union Legislation, this statute remains in force in the Transvaal Province. The section (s. 4) corresponding with s. 1 of the English Act omits sub.-s.1 and all reference to banking, and the section applies to "any business that has for its object," etc. No provision is made for companies limited by guarantee. The provision that the company shall have power to hold lands is omitted, this provision being apparently unnecessary in South Africa since the English common law as to tenure of land is not in force; s. 19 of the English Act is in consequence also omitted, but s. 20 (allowing the word "limited" to be dropped by non-profit associations) is reproduced (s. 21). The section (s. 23) corresponding with s. 23 of the English Act has a clause requiring vendors' and promoters' shares to be distinguished on the share certificate for six months after registration of the company. The provisions relating to companies authorised to register under the Act (ss. 249–66 of the English Act) are omitted. The provisions relating to private companies, annual balance-sheets, and directors' unlimited liability, are all reproduced.

**India.**—India adopted the English Act of 1908 in 1913, and an amending Act has since been passed relating to the liabilities of

[1] Companies Act, 1909 (No. 31).

directors interested in contracts with the company.[1] The Act of 1913 follows the English Act closely for the most part. One difference of some interest is the provision for annual balance-sheets. Prior to 1907 India and Victoria were the only two jurisdictions in which annual balance-sheets were required to be published. In adopting the English Act of 1908, both the English enactment and also the former Indian enactment on the subject were dropped, and in the new Act of 1913 the stringent provisions of the Victorian Act as to keeping proper books and publishing annual balance-sheets were inserted; ss. 131–4 of the Indian Act of 1913 now correspond with s. 115 of the Victorian Act of 1915. The provision for non-profit associations holding land by special licence (s. 19 of English Act) is omitted. A "British register" may be kept. The provision as to liability of banks on their note issue (s. 251 of English Act) is omitted. The provisions of the English Act for private companies and unlimited liability of directors are reproduced.

**Hong-Kong.**—Of the eight Crown Colonies, Hong-Kong perhaps shows the most considerable departure from the English model, by reason of the provisions for Chinese documents and the express requirement that certain documents shall be in the English language.[2] The two amending statutes are mainly concerned with these local conditions. The prohibition of large partnerships (s. 1 of English Act) allows twenty as the limit for "banking or any other business." Local registers outside the colony may be established by special licence. The English provisions for private companies, annual balance-sheets, and directors' unlimited liability, are all reproduced.

**Straits Settlements.**—In the Straits Settlements[3] statute provision for books and accounts to be in the English language is made, as in Hong-Kong. The English Act is otherwise closely followed. The provision for "colonial registers" (ss. 34–6 of English Act) is, however, omitted. The provisions for private companies, annual balance-sheets, and directors' unlimited liability, are all reproduced.

**Fiji.**—In Fiji[4] one amending statute relates to the duties of

[1] Indian Companies Act, 1913 (No. 7); Indian Companies (Amendment) Act, 1914 (No. 11).

[2] Companies Ordinance, 1911 (No. 58); Companies Amendment Ordinance, 1913 (No. 22); Companies Ordinance, 1915 (No. 31).

[3] Companies Ordinance, 1915 (No. 25).

[4] Companies Ordinance, 1913 (No. 13); Companies Amendment Ordinance, 1914 (No. 15); Companies (Branch Registers) Amendment Ordinance, 1915 (No. 16).

a liquidator in winding up, and another permits branch registers to be kept abroad by special licence. The limit of large partnership is twenty, for "banking or any other business," as in Hong-Kong. In other respects the English Acts of 1908 and 1913 are followed, including private companies, annual balance-sheets, and directors' unlimited liability.

**Mauritius.**—The Mauritius statutes[1] show some little trace of the fact that the basis of the Colony's law is French. The amending statute relates chiefly to winding up. The section (s. 4) of the principal Ordinance corresponding with s. 2 of the English Act of 1908 provides that *sociétés civiles* under the civil code are not affected, and that all companies registered under the Ordinance are deemed "commercial companies." The provision of the English Act as to non-profit associations holding land by special licence (s. 19 of the Act of 1908) is omitted. Branch registers may be kept "in any foreign country." The provision for special statements by banks (s. 108 of English Act) is omitted, as also is the group of sections (ss. 249–66) relating to registration of other companies. Private companies, annual balance-sheets, and directors' unlimited liability, are provided for.

**British Guiana.**—The British Guiana statute[2] approaches more nearly than any other to being a transcript of the English Act of 1908. The English amending Act of 1913 is not reproduced. S. 251 of the Act of 1908 (banks and their liability on note issue) is omitted.

**Trinidad and Tobago.**—In the case of Trinidad and Tobago a few special local provisions have been added to the statutes.[3] The provision for non-profit associations holding land by special licence (s. 19 of English Act) is omitted. Ss. 249–66 of the English Act (registration of other companies) are also omitted. Private companies, annual balance-sheets, directors' unlimited liability, are as in the English Acts of 1908 and 1913. Branch registers may be kept in the United Kingdom or any British Colony. It is expressly provided that a company incorporated outside the Colony cannot hold lands in the Colony unless it complies with the statutory re-

[1] Companies Ordinance, 1912 (No. 35); Companies (Amendment) Ordinance, 1913 (No. 27).

[2] Companies (Consolidation) Ordinance, 1913 (No. 17).

[3] Companies Ordinance, 1913 (No. 31); Companies Amendment Ordinance, 1914 (No. 31).

quirements as to filing documents, address, etc. Another provision (s. 227) relates to the execution of deeds by a company out of the Colony.

**Barbados.**—In Barbados[1] the minimum number of persons who can form a company is five for a public company. Otherwise the English Act of 1908 is followed generally. The section (s. 19) relating to non-profit associations holding land by special licence is omitted; so are ss. 249–66 (registration of other companies). Private companies, annual balance-sheets, directors' unlimited liability, are as in the English Act of 1908. Branch registers may be kept in the United Kingdom or any British Colony.

**Southern Nigeria.**—Southern Nigeria[2] follows the English Act of 1908 closely, even as to the keeping of an "extra-colonial register" (ss. 34–6 of English Act). Ss. 249–66 of the English Act (registration of other companies) are omitted. Private companies, annual balance-sheets, directors' unlimited liability, are as in the English Act of 1908.

**Conclusion.**—The totality of legislative units in the Empire stands towards the law of joint-stock trading companies in this way: Some have next to nothing resembling English company law; others have a system differing both in matters of principle and in detail from the English Companies Acts; others, again, have adopted both the principle and many details of the Companies Act, 1862, and its amendments; the United Kingdom has consolidated the Acts of 1862 to 1908 into one statute—the Companies (Consolidation) Act, 1908, and this Act has been taken as a model by a few of the self-governing Dominions and several of the Crown Colonies. As regards the groups (represented by Bermuda and Newfoundland respectively) which have no company law or only the Act of 1862 and its amendments, it should not be difficult for the local Legislatures to fall into line with the United Kingdom and such dominions as Victoria and British Columbia, and at once adopt the English Act of 1908. Canada presents some difficulty, but the example of British Columbia, the Yukon, and Prince Edward Island might well be followed by the Dominion Legislature and the rest of the Provinces, and the English Act of 1908 adopted. It would be necessary for the Canadian Legislatures to recognise the advantages of a

[1] Companies Act, 1910 (No. 10).
[2] Companies Ordinance, 1912 (No. 8).

statutory incorporation which confined the company strictly to its professed objects. Were this change made in Canada, and the present process of adopting the 1908 Act hastened elsewhere, a reasonably uniform company law would be established throughout the Empire.

The English Act of 1908 has already been amended, and when the time comes for a further consolidation it may be that, in lieu of another consolidating statute being passed, public opinion will be ripe for the enactment of a codifying Companies Act. Such a codifying Act would be adopted by the overseas Legislatures with far more readiness than any mere consolidation.

# NOTES ON CASES.

## ENGLAND.

[*Contributed by* EDWARD MANSON, ESQ.]

**Slander against a Schoolmaster.**—It is a pity that the Law Lords should not have seen their way in *Jones* v. *Jones*, [1916] A.C. 481, to rationalise the law of slander, but should have left it still a "wilderness of single instances." That it should be inadequate and full of inconsistencies is not to be wondered at after the haphazard way in which the law has grown up—now under the spiritual, now under the temporal jurisdiction, as Lord Haldane pointed out. Yet even so, there runs through the law a real unity of principle—reflecting our national temperament. A man is not to be curtailed of his right of free speech, but he must use not abuse this freedom; he must not speak falsely or recklessly so as to injure another in his calling or character. In the case before the House of Lords a husband and wife had accused the headmaster of a Welsh school—a certificated teacher—of adultery with a woman who came in to clean the school premises. At the trial before Lush J. the jury found that the words were spoken of the plaintiff in the way of his calling, but the House of Lords were of opinion that there was no evidence to go to the jury on this point, and failing such evidence the action would not, on the authorities, lie. Had the plaintiff been a clergyman—at all events a beneficed clergyman—the result would have been otherwise, because he would or might lose his living. Yet it was admitted frankly by the defendant's counsel that a schoolmaster charged with adultery would infallibly lose his post if the charge was made good. In the case of an imputation of insolvency to a trader, the law will take notice that solvency is so essential a factor in the existence of a trader that to speak of him as insolvent will necessarily touch him in his trade.[1]

[1] *Read* v. *Hudson, Ltd.*, Ld. Raymond 610.

Is not the Court—in these days at least—to take notice that the moral character of a schoolmaster is an essential factor in his existence, charged as he is with the care of the young—to train as well as teach? To test it, which parent would dream of confiding his boys to a schoolmaster of lax morals? The House of Lords did not question this, but they found no case precisely in point, and failing it, they did not venture to extend the principle of imputed insolvency to the charge of immorality before them. If the law was to be made it had better be made by the Legislature, as it had been in the analogous case of the Slander of Women Act, 1891.

**The Late Mr. Justice Day and Law.**—*Apropos* of technicality, the son of the late Mr. Justice Day in his recent memoir of his distinguished father tells us a curious thing. When the Judge started in life and was called to the Bar by the Middle Temple, it was a mere matter of form; he had no taste for the law or intention of practising it, but it so happened that as a boy at Bath he had once attended a Court of Quarter Sessions, and had heard an indictment quashed on the ground that accused's Christian name was wrongly spelt. This incident seems, says his biographer, to have "stirred in him a latent enthusiasm for a system which could uphold so strict a standard." Here was the true spirit of the special pleader. It is rather remarkable that his own book—Day's *Common Law Procedure Acts*—should have done more than anything else to give currency to the new system of "mere common sense" and relegate John Doe and Richard Roe to the law's "lumber room."

**Directors' Veto on Transfers.**—When companies first began to multiply under the Act of 1862, restrictions were seldom placed upon the transfer of shares—one of the chief objects of the Act, as Lord Blackburn said, being to render shares freely transferable—but it was soon found that this freedom of transfer was susceptible of abuse. A solvent shareholder might transfer on the eve of a winding up to a man of straw, and still may in the absence of any restriction. In self-defence therefore a company had to give the directors a control over transfers, unless the shares were fully paid up, in which case the Stock Exchange would not and will not allow any veto. But the measure of the directors' power to refuse a transfer is the necessity of the company's protection, for the power being in derogation of a right of property—which a share is—directors cannot be allowed under the guise of such a discretion

to practically confiscate a member's shares. They—directors—must exercise it as they must all their powers, *bona fide*, and they must have grounds for their refusal. So far the members of the Court of Appeal were agreed in the recent case of *The Bede Steam Shipping Co.* There the articles gave the directors power to refuse a transfer on their certifying that in their opinion it was contrary to the interests of the company. This the directors in *The Bede Steam Shipping* case had done and done honestly, but Mr. Justice Eve and a majority of the Court of Appeal were of opinion that the reasons given by the directors for refusing to pass the transfer showed no sufficient grounds, and that the refusal to register was therefore bad. Lord Justice Scrutton, however, dissented on the ground that the Court was not the judge of the sufficiency of the directors' grounds of refusal. It was enough that they satisfied the directors as reasonable men. A very important point is involved here—that it is not for the Court to interfere with directors in the management of the company's business. It is confided to them by the shareholders, and the Court ought not to take it out of their hands, unless the directors are doing something which is *ultra vires* or a fraud on the right of a minority of the shareholders. Of course the grounds alleged may, as in the case of a jury's verdict, be so unreasonable as to argue the decision perverse or prompted by improper motives, but short of that they ought to prevail.

## AUSTRALIA.

[*Contributed by* JAMES EDWARD HOGG, ESQ.]

**Retrospective Legislation. Criminal Legislation.**—The Australian Constitution does not, as is done by the United States Constitution, expressly forbid *ex post facto* legislation, nor does it follow the Canadian Constitution in expressly conferring power to enact criminal statutes. The case of *Rex* v. *Kidman*[1] is an authority that the Commonwealth Parliament has had conferred upon it by implication both the power to enact statutes that shall have a retrospective operation and the power to create a statutory crimina

[1] (1915) 20 C.L.R. 425.

law. It is singular that the Crimes Act, 1914, should have been the first Act of the kind passed by the Commonwealth legislature. The validity of this particular statute (a substantial one of ninety sections) was not challenged in the present case, and the High Court's decision that it is valid was incidental only. The questions actually decided had to do with the Crimes Act, 1915, an amending Act which added conspiracy to defraud the Commonwealth to the list of offences in the Act of 1914, and made the new Act operate as from the date of the Act of 1914 coming into operation. The offence charged having been committed prior to the passing of the amending Act, the question was thus raised whether such *ex post facto* legislation was valid, and the question of the general competence of the Commonwealth legislature with respect to criminal legislation also arose incidentally. The validity of the Act of 1915 from both points of view was upheld, and it is interesting to observe that this validity was made to rest on the rather narrow foundation of the last placitum (pl. xxxix.) of s. 51 of the Constitution, which empowers the Parliament to legislate with respect to " matters incidental to the execution of any power vested by " the Constitution in the Commonwealth. A good deal turned on the meaning to be attached to the word " incidental." Though this is not mentioned in the report of *Rex* v. *Kidman*, a reference to the Crimes Act, 1915, discloses the fact that it is declared to be in force only for the period of the war and six months after. This may have been done to mark the dislike of the legislature to *ex post facto* legislation ; otherwise the reason for the declaration is not apparent.

**Legislation Incidental to Taxation.**—It has been found necessary for the High Court of Australia to decide expressly—what would seem to be fairly clear—that the power of the Commonwealth Parliament to impose customs duties includes a power to enact that, when the duty on imported goods is altered between the date of a contract for their sale and of their delivery, the seller may add an increase of duty to the price and the buyer may deduct a decrease of duty from the price, as the case may be: *G. G. Crespin & Son* v. *Colac Co-operative Farmers*.[1] S. 152 of the Australian Customs Act, 1901, has therefore been held valid. This section adjusts alterations in duty as between seller and buyer in the same manner as is done by s. 10 of the English Finance Act, 1901, and many other similar

[1] (1916) 21 C.L.R. 205.

enactments have been passed both in the United Kingdom and overseas.

**Trading with the Enemy.**—As to what is or is not trading with the enemy the High Court of Australia was divided in *Moss & Phillips* v. *Donohoe.*[1] The Chief Justice (Sir Samuel Griffith) thought the circumstances disclosed no case of enemy trading; the other four judges were of opinion that such a case had been made out. Put in the smallest possible compass the facts were these: An American company with its head office at New York had branch offices at Rotterdam and Hamburg. The company's business was the sale of gin, which was manufactured in Holland and stored in Hamburg. The appellants sent from Australia a cable to the company in New York by which the company was requested to send them in Australia a quantity of this gin. The appellants were convicted of trading with the enemy, and the conviction was upheld. The kernel of the matter was—and this was the point on which the High Court was divided—that the appellants knew the goods would have to be obtained from Hamburg in order to be despatched to them in Australia.

In another case (*Berwin* v. *Donohoe*[2]) the High Court was evenly divided as to whether a case of enemy trading had been made out, but as here too the Chief Justice thought there was no such case, his casting vote under s. 23 of the Judiciary Act, 1903, resulted in reversing the conviction. In this case the appellant had assisted an American in Sydney to forward to America goods belonging to a German in Hamburg, it being impossible to send the goods to or communicate with the German. The appellant was himself a German by birth and had only been recently naturalised as a British subject, and the circumstances rather resembled those in *Rex* v. *Kupfer*,[3] upon which one of the dissenting judges relied.

**Moneylenders Act.**—With reference to the observations on the New South Wales case of *Bull* v. *Simpson*,[4] the opinion has now been expressed in the High Court of Australia[5] that "the investing of money on mortgages of real estate, although carried on systematically and on a large scale," is not to "be regarded as carrying on the business of a moneylender within the meaning of the Act."

[1] (1915) 20 C.L.R. 580. [2] *Ibid.* 1. [3] (1915) 2 K.B. 321.
[4] (1915) 15 S.R. (N.S.W.) 365. See Journal vol. xvi. p. 354.
[5] *Rabone* v. *Deane*, (1915) 20 C.L.R. 636.

This, though not a formal decision, somewhat shakes the authority of *Bull* v. *Simpson*.

**Form of Settling Life-interests on Husband and Wife.**—The most usual form of settling successive life interests of personalty on husband and wife is believed to be a gift to one spouse for life, and on the death of that spouse then to the other. The effect of this is that the first-named spouse at once has a gift of the income for life, and this complete gift is not affected by the death of the second spouse before the second life interest falls into possession. This may be important with respect to the incidence of death duties, since no new interest arises in the first spouse on the premature death of the second. The enjoyment of the income for life will be precisely the same if the gift be to the spouses successively during their joint lives, and on the death of either then to the survivor. But the result as to the death duties may be different, for the interest during the joint lives comes to an end on the death of either, and the survivor continues in the enjoyment of the income under a different right. The reality of this distinction is aptly illustrated in *Commissioners of Stamp Duties* v. *Perpetual Trustee Co.*,[1] and the case is one to which the attention of conveyancers may usefully be drawn.

**Public Policy.**—Agreements for services to be rendered in consideration of payment are not often held void as being against public policy. An instance of an agreement being void on this ground has occurred in *Wilkinson* v. *Osborne*,[2] where the High Court of Australia overruled the Supreme Court of New South Wales. Two persons, who were members of the New South Wales State Parliament and also "land agents," agreed for a high rate of remuneration to bring pressure on the State Government (of which they were supporters) in order to ensure the acquisition for public purposes of certain land offered by the owner at a certain price. The efforts of these members of Parliament were successful, but the agreement for their remuneration was held void on the ground that it was against public policy for them to so use their position as members of the legislature which would eventually have to approve of the purchase. The Court below seems to have relied on the fact of these persons being "land agents"—whose business it was to negotiate such transactions between the Government and private owners—as a justification of their conduct. The view of the High

[1] (1915) 21 C.L.R. 69. [2] *Ibid.* 89.

Court was that it was a clear case of conflict between interest and a particularly high duty to the public.

**Life Insurance by Bankrupt.**—One peculiarity of insurance law in Australasia is that life insurance policies are automatically protected against creditors. In England an ordinary life policy for the assured's own benefit is of course not so protected. Thus in all parts of Australasia a life policy usually would not on bankruptcy vest in the bankruptcy trustee. A case has just occurred in New South Wales [1] where an uncertificated bankrupt insured his life, and died while still a bankrupt. It was held that the statutory protection under s. 4 of the Life, Fire, and Marine Insurance Act, 1902, applied, and the bankruptcy trustee was not entitled to the proceeds of the after-acquired policy.

**War Legislation in Federations.**—The hampering effect of a federal Constitution on war legislation is illustrated by a case in the High Court of Australia : *Foggitt, Jones & Co.* v. *State of New South Wales.*[2] The State Legislature of New South Wales passed the Meat Supply for Imperial Uses Act, 1915, by which it was

> declared that all stock and meat in any place in New South Wales . . . shall be held for the purposes of and shall be kept for the disposal of His Majesty's Imperial Government in aid of the supplies for His Majesty's armies in the present war.

The appellants (of Queensland domicil) purchased some pigs in New South Wales and desired to remove them into Queensland. The New South Wales Government took steps to prevent their removal. The High Court held that the Meat Supply Act conferred no authority on the State to prevent the appellants taking their stock into Queensland. By s. 92 of the Constitution " . . . trade, commerce, and intercourse among the States . . . shall be absolutely free," and the New South Wales statute, so far as it interfered with this freedom, was invalid.

In *Farey* v. *Burdett* [3] the question at issue was whether the Commonwealth Parliament had authority to pass legislation for the purpose of fixing prices of the necessaries of life during the war. It was contended that this was a matter for the individual States to do, and not the Commonwealth.

By the War Precaution Act, 1916, the Governor-General of

[1] *Re Rygate*, (1916) 16 S.R. (N.S.W.) 129.
[2] (1916) 21 C.L.R. 357. [3] *Ibid.* 433.

Australia was empowered to make regulations prescribing the conditions of the disposal of property, goods, etc., and under this power a regulation fixing the maximum price of bread was made. An appeal from a conviction for breach of this regulation was carried to the High Court, on the ground that the Act was *ultra vires* of the federal legislature. It was contended, on the other hand, that the Act fell within s. 51 (vi.) of the Constitution, by which the Commonwealth Parliament may legislate with respect to " the naval and military defence " of the Commonwealth and the States, and this argument prevailed. The Court was not, however, unanimous, and two of the seven judges who heard the appeal were of opinion that the power of fixing the price of bread was a matter for State and not Commonwealth legislation. The question, of course, turns on the extent to which the fixing of food prices can be considered as a measure of " naval and military defence."

## INDIA.

[*Contributed by* Sir E. J. Trevelyan.]

**Liability of Government of India.**—In British India the relations between the Government and the subject differ from those which exist in England between the Crown and the subject. This difference is explained by the history of the development of the Government of India. The East India Company commenced as a trading corporation, and by degrees assumed the functions of a Sovereign power. When the Government was taken over by the Crown, the Crown stepped into the place of the Company, and the relations between the Crown and the subject, so far as rights of suit were concerned, remained practically the same as they were at the time of the extinction of the Company.

There have been several cases in which the liability of the Secretary of State as representing the Government, or rather the liability of the revenues of India, for the acts or defaults of the servants of the Government in India has been the subject of judicial consideration. The latest decision on this subject is that of the *Secretary of State* v. *Cockcraft.*[1] In that case the plaintiff claimed damages for injuries sustained by him in a carriage accident which was alleged to have been due to the

[1] (1914) 39 Mad. 351.

negligent stacking of gravel on a military road maintained by the Public Works Department of the Government. It was held that the act was done by the servants of Government in exercise of the sovereign power of the Government, and that therefore the revenues of India were not liable. Acts done by the Government such as might have been done by private individuals, or by municipalities or similar bodies, stand upon a different footing. They are not done in exercise of sovereign power. Thus in the leading case of the *Peninsular and Oriental Steam Navigation Company* v. *Secretary of State*,[1] it was held that the revenues of India were responsible for the negligent acts of servants of Government who were working in a Government dockyard. It is sometimes not quite easy to say what is a "sovereign act."

The authority of the *Peninsular and Oriental Steam Navigation Company* v. *Secretary of State* has been recently upheld in *Secretary of State* v. *Moment*.[2] In that case the Judicial Committee held that s. 41 of an Act passed by the Burma Legislative Council,[3] which enacted that no Civil Court shall have jurisdiction to determine any claim to any right over land as against the Government, was *ultra vires*, as being in contravention of s. 65 of the Government of India Act, 1858. An attempt was made in the Bill relating to the Government of India which was recently introduced to give Legislative Councils power to bar suits against Government, but this proposal was dropped in Committee.

**Alienation by Hindu Widow.**—It has long been clearly settled that under Hindu law a widow who takes by inheritance the estate of her husband has not a full estate in the property, and can only alienate it for purposes of necessity, or to a small extent for the spiritual welfare of her deceased husband. The Courts have not hitherto been inclined to extend her powers of dealing with the estate, even where it could be said that the alienation was for the spiritual benefit of the husband. Small gifts to idols and to Brahmins have been upheld. The expenses of a pilgrimage for the unquestioned religious benefit of the husband might also be justified; but the interests of the reversioners who take on the death of the widow have to be considered. A division Bench of the High Court of Bengal in *Khub Lal Singh* v. *Ajodhya Missen* [4] has gone very far.

[1] (1861) 5 Bombay H.C.R. App. 1.
[2] (1912) 40 L.R. I.A. 48.
[3] Act 4 of 1898.
[4] (1915) 43 I.L.R. Calc. Ser. 574.

It has upheld an alienation for the purpose of digging a tank and erecting a wall in connection with a temple founded by the husband shortly before his death. The decision is an interesting one, but it does not show very satisfactorily how the acts in question conduced to the spiritual benefit of the husband.

**Islands.**—In the *Secretary of State for India* v. *Rajah Chelikani Rama Rao*,[1] Lord Shaw, in delivering the judgment of the Judicial Committee, upheld the right of the Crown to islands which emerge within the limit of three miles from the shore of British territory. The Committee applied to India the rule of law which is to be found in the decision of the English and Scotch Courts. As his Lordship points out, any other rule would produce the greatest inconvenience.

**Marriage of a Mahomedan to an Englishwoman.**—The decision of the Chief Justice and of Darling and Bray JJ. in *Rex* v. *Superintendent Registrar of Marriages for the District of Hammersmith—Ex parte Mir Anwaruddin*, (1916) 32 Times L.R. 59, which has been upheld by the Court of Appeal, is of considerable importance, as it determines the status of the parties to marriages in England between Orientals and Englishwomen.

In *Chetti* v. *Chetti*, [1909] P. 67, Lord Gorell, when President of the Probate, Divorce, and Admiralty Division, decided that the validity of a marriage in England, according to English forms, between an Englishwoman and a Hindu must be determined by the English law of marriage, whatever the Hindu law on the subject may be. In *Mir Anwaruddin's* case, the Court has accepted the doctrine laid down in *Chetti* v. *Chetti*, and has further held that the status following from an English marriage is applicable to such marriages. It has therefore declined to give effect to a divorce which under Mahomedan law it is competent for a husband to effect by his mere declaration.

The facts are as follows: Dr. Mir Anwaruddin is a native of and domiciled in India, and is by religion a follower of Mahomet. On March 11, 1913, he contracted a civil marriage in London with Ruby Pauline Hudd. On May 3, 1913, she deserted him, and has ever since refused to cohabit with him. Subsequently he filed a suit in the City Court of Madras, and obtained a decree for restitution of conjugal rights. She refused to obey this decree. In August 1913 she commenced proceedings for a judicial separation in the Divorce

[1] (1916) I.L.R. 39 Madras 617.

Division of the High Court of Justice, but did not proceed with her suit, and her petition was dismissed.

On August 27, 1915, he made in London a formal declaration of divorce. It may be taken that this declaration, or *talak* as it is called, creates a valid divorce according to the law administered by the Courts of Justice in India. In order to ascertain his position in England, Dr. Mir Anwaruddin presented a petition in the Divorce Division of the High Court of Justice for a decree (1) declaring that the marriage had been dissolved and (2) alternatively for dissolution of the marriage on the ground of the misconduct of the wife. The Registrar refused to admit the petition, on the ground that the petitioner was not domiciled in this country. On appeal, Mr. Justice Bargrave Deane in July 1916 upheld the Registrar's decision, and added that in his judgment the marriage had been dissolved, according to law, and that as there was no subsisting marriage, the Court could not pronounce a decree.

In August 1916, Dr. Mir Anwaruddin applied to the Superintendent Registrar for a certificate and licence to marry Violet Louise Ling. The application was refused, and thereupon Dr. Mir Anwaruddin applied to the King's Bench Division for a mandamus. Following *Chetti* v. *Chetti*, the King's Bench Division held that the marriage with Ruby Hudd was a valid marriage, and being a marriage made in England created the status which the English law confers upon married persons.

The Mahomedan law has no application to this case. As pointed out by the Chief Justice, the lady by marriage acquires her husband's domicile, but not his religion, or the law which is a part of that religion, which is only a personal law, and not the general law of the domicile.

The decision also shows that the marriage can only be dissolved by the decree of a competent Court. Neither the law of England nor that of India gives to Mir Anwaruddin an opportunity of obtaining such decree. The English Divorce Court can only decree a divorce in the case of persons domiciled in England. The Indian Divorce Act has no operation in the case of Mahomedans, and he has no remedy in any other Court in India. If he had made a marriage according to the forms of Mahomedan law, and had not by his marriage according to English forms adopted the attributes of an English marriage, the Courts in India would accept his *talak* as effectual.

# NOTES.

**An Accused Person as a Witness.**—Mr. Justice Innes of the Federated Malay States writes, in reference to Sir E. J. Trevelyan's suggestion in the last number of the Journal, "that the Indian Legislature might well consider whether an accused person should not be permitted to give evidence on his own behalf," [1] as follows:

"The Indian Evidence Act was adopted *en bloc* by the Colony of the Straits Settlements in 1893, and shortly afterwards by the Federated Malay States; but the following important section was added to s. 120 of the Indian Act, dealing with the competence of witnesses:

> In criminal trials the accused shall be a competent witness in his own behalf, and may give evidence in the same manner and with the like effect and consequences as any other witness, provided that so far as the cross-examination relates to the credit of the accused the Court may limit the cross-examination to such extent as it thinks proper, although the proposed cross-examination might be permissible in the case of any other witness.

There is also in force here the Indian Criminal Procedure Code with alterations to suit local conditions, but containing the provision mentioned by Sir E. J. Trevelyan permitting a magistrate or judge to question the accused for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him.

"It is a matter of surprise to the writer that the Indian Legislature has not decided to alter the existing law and make an accused person in a criminal trial a competent witness, for it is his firm conviction after over twenty-five years' experience of work in criminal courts in Malaya, first as Magistrate, then as Public Prosecutor, and finally as Judge of the Supreme Court, that such a provision is in the interests of the administration of justice in an Eastern

[1] Journal, vol. xvi. p. 362.

country. He has frequently known an accused person remove by his own evidence the unfavourable effect of inculpatory evidence against him with a completeness and success that could not have been achieved in any other way. On the other hand he has occasionally seen an accused go into the witness box in the hope of explaining away incriminating evidence by perjurous statements and effect nothing more than furnish additional proofs of his guilt. Such a result could only be cited as an argument against allowing an accused person to be a witness by those theoretical writers upon criminal law who seem to lose sight of the fact that criminal courts are established in order that the guilty may be punished as well as that the innocent may go free."

**Rights of Illegitimate Children under Modern Statutes.**—To President Castberg's article in the last number of the Journal on the subject of Children's Rights Laws and Maternity Insurance in Norway, may be added the following discussion of the subject from the comparative law point of view in the *Columbia Law Review* (December 1916):

"Under the early common law of England the lot of the child born out of wedlock was an intolerable one; he was regarded as *filius nullius*, having no right to inherit from either father or mother, no right to the surname of either parent, and no claim on them for support or education.[1] This stern policy has been defended as 'to the encouragement of marriage and the discouragement of illicit intercourse';[2] but the surest proof that such punishment of the child for the wrongs of its parents had its real root in mediæval barbarism is furnished by the fact that modern English legislation imposes a liability for maintenance on the parents of bastards,[3] while in most American jurisdictions statutes facilitating their

[1] See Hooper, *Law of Illegitimacy*, 25, 122, 135; Peck, *Domestic Relations*, s. 123

[2] See *Clarke* v. *Carfin Coal Co.*, (1891) A.C. 412, 427, *per* Earl of Selborne.

[3] Thus, under the Poor Law Amendment Act of 1834 (4 & 5 Will. IV. c. 76, s. 71), and that of 1844 (7 & 8 Vict. c. 101, s. 6), a mother is punished for failure to support her infant illegitimate child, if she has the means to do so. Where a bastard child becomes chargeable to the parish, guardians may recover the cost of the relief from the father under Bastardy Laws Amendment Act, 1873 (36 Vict. c. 9, s. 5); and in proceedings by the mother brought under Bastardy Act, 1872 (35 & 36 Vict. c. 65, ss. 3, 4, 5), a defendant adjudged to be the putative father of the child may be ordered to pay not exceeding 5*s.* a week for its maintenance and education until it attain thirteen or sixteen years. See Matthews, *Law Relating to Children and Young Persons*, 376; Hooper, *Law of Illegitimacy*, 136–8.

legitimation,[1] and giving them certain rights of inheritance,[2] are also to be found on the books. The doctrine of *filius nullius*, however, has by no means lost its potency; save where expressly limited by statute, or by anomalous local precedent, it remains the law in English-speaking countries to-day.[3]

"It is significant that the illegitimacy laws of few European nations equal in severity those of England and the other jurisdictions where *filius nullius* still holds sway. Whereas the liability of the father for the bastard's maintenance under the English statute is limited to the payment of an insignificant weekly sum, the German Civil Code obliges him to accord to the child until the completion of its sixteenth year education and maintenance in accordance with the mother's station in life.[4] In France the issue of an incestuous or adulterous union can lay claim only to maintenance; but other illegitimate children are permitted, after compelling legal recogni-

[1] See, *inter alia*, Rev. Stat. Ariz. 1913, Civ. Code, s. 1103 (subsequent marriage of parents legitimates); Mass. Rev. Laws 1902, p. 1267 (subsequent marriage *plus* acknowledgment by father); N.J. Laws 1915, c. 173 (subsequent marriage of parents *plus* treatment of child as their own); Park's Ann. Code Ga. 1914, Civil, s. 3013 (Court may declare child legitimate on petition of father); Rev. Codes Mont. 1907, s. 4821 (adoption into father's family after marriage of parents legitimates); Rev. Laws Nev. 1912, s. 5833 (public acknowledgment by father, or reception into his family); Sess. Laws New Mex. 1915, c. 69 ("general and notorious" recognition by father, or in writing signed by father in presence of two competent witnesses).

[2] Statutes of nearly all American jurisdictions give illegitimate children the right to inherit from the mother. See, *inter alia*, Code of Ala. 1907, s. 3760; Fla. Comp. Laws 1914, s. 2292; Hurd's Rev. Stat. Ill. 1915–16, p. 980, s. 2; Burns' Ann. Ind. Stat., Rev. of 1914, s. 2998; Carroll's Ky. Stat. 1915, s. 1397; Page & Adams' Ann. Ohio Gen. Code 1910, s. 8590; Hogg's West Va. Code 1913, s. 3905. But in many states the right to represent the mother in inheriting from her kindred is denied. Comp. Laws Terr. of Alaska 1913, s. 597; Deering's Civ. Code Cal. 1915 s. 1387; Rev. Codes Idaho 1908, s. 5703; Howell's Mich. Stat. 1913, s. 10960; Gen. Stat. Minn. 1913, s. 7240; Rev. Codes Mont. 1907, s. 4821; Rev. Stat. Neb. 1913, s. 1273; Pub. Laws No. Car. 1913, c. 71; Comp. Laws No. Dak. 1913, s. 5,745; Rev. Laws Okla. 1910, s. 8,420; Lord's Oregon Laws 1910, s. 7,351; Comp. Laws So. Dak. 1913, vol. ii. p. 194; Remington and Ballinger's Ann. Code Wash. 1910, s. 1345; Wis. Stat. 1915, s. 2274. In general, a bastard is not entitled to inherit from his father unless legitimated in some way (see footnote 1 on this page); but there seem to be some statutes under which acts of recognition by the father will give the bastard the right to inherit without necessarily legitimating him for other purposes. See, *inter alia*, Rev. Codes Idaho 1908, s. 5703; Burns' Ann. Code Ind. Rev. of 1914, s. 3000; Dassler's Gen. Stat. Kan. 1909, ss. 2955, 2956; Me. Rev. Stat. 1903, p. 664; Gen. Stat. Minn. 1913, s. 7240; Comp. Laws So. Dak. 1913, v. ii. p. 194.

[3] See Peck, *Domestic Relations*, s. 123; Hooper, *Law of Illegitimacy*, 100 *et seq.*

[4] Loewy, *Civil Code of the German Empire* (1909), s. 1708.

tion by a court proceeding, to inherit one-half of the share to which a legitimate child would be entitled if the parents have also legitimate issue, three-quarters if there are only relatives other than descendants, and the whole of the inheritance if there are no other heirs.[1] The Belgian Law is similar.[2] Under the Spanish Civil Code, all illegitimate children, where the paternity or maternity is sufficiently established, have a right to support; and natural children, who are defined as those born out of marriage of parents who, at the date of the conception of the child, could have married with or without dispensation, receive, if recognised by either parent, the right to bear that parent's name, and rights of inheritance corresponding broadly to those of legitimate issue.[3] In Switzerland children born in breach of marriage or in incest may not be legally recognised, but other illegitimates, if acknowledged by the father or successful in a suit to establish the paternity, may claim from the father maintenance to the end of the eighteenth year as well as a limited inheritance from him; and if it is established that the father promised marriage to the mother, or was guilty of a misdemeanour as to her at cohabitation, or abused his power over her, the child may claim the father's civil status, including his family name and domicile.[4]

"It will be seen from the foregoing review that even progressive European countries have been slow to grant full family rights to illegitimate children. It remained for Norway, in the so-called Children's Rights laws of April 10, 1915, to take the initial step towards putting bastards on an equal footing with legitimate issue. The Norwegian statute, among other subject-matters, enacts that a child whose parents have not entered into marriage with each other has a right to the family name of both father and mother, the right to inherit from both and from their relatives as if born in wedlock, and a claim on whichever of the parents has the care of it to maintenance and education in the same manner as if it were legitimately born.[5]

[1] Carpentier, *Code Civil* (Paris, 1914), ss. 340, 341, 756–64.

[2] Todd, *Treatise on the Belgian Law* (London, 1905), pp. 71, 73.

[3] *Codigo Civil Español* (Spanish editions of Scaevola and Moreno, English edition of Walton), arts. 114, 119, 134, 139–43, 840–7.

[4] Shick, *Swiss Civil Code of Dec.* 10, 1907 (1915), ss. 303, 304, 307–27.

[5] See article in *The Journal of the Society of Comparative Legislation*, vol. xvi pp. 284–96 (July 1916).

"It is submitted that the Norwegian statute accomplishes in a direct and manly way a much-needed reform at which American Courts and legislatures have hinted and connived, but to which they have not given their open support. The powerful presumption of legitimacy which the law raises even in cases where there is every indication of illicit conception,[1] the numerous statutes declaring legitimate the issue of marriages null in law or dissolved by divorce,[2] the almost universal tendency to give illegitmate children rights of inheritance from their mother and in case of legitimation or recognition from their father, the equally prevalent method of charging the father with some portion of the expense of maintenance in bastardy proceedings instituted by the mother or the overseers of the poor of the township where the child has become a charge,[3] —all these things are a tacit acknowledgment of the inexpediency and injustice of disposing of the bastard with the summary brutality of the common law. It does not help to discourage illicit intercourse to allow the father to escape all responsibility for the maintenance and education of his illegitimate offspring. The holy institution of matrimony is not exalted, nor is the public weal advanced, by the creation of an anomalous pauper class, the issue of temporary unions where passion may be given full sway because the cares of paternity and the sharing of name and heritage do not accompany it. Only by holding parents strictly to account can promiscuous propagation be restrained by law; and only by granting

[1] See Peck, *Domestic Relations*, s. 105; Schouler, *Law of the Domestic Relations*, s. 237 and note.

[2] See, *inter alia*, Kirby's Dig. Stat. Ark. 1904, s. 2640; Park's Ann. Code Ga. 1914, Civil, s. 2935; Rep. Codes Idaho, 1908, s. 5703; Gen. Stat. Minn. 1913, s. 7105; Rev. Stat. Mo. 1909, s. 342; Rev. Laws Nev. 1912, s. 6117; Comp. Laws No. Dak. 1913, s. 5745; Comp. Laws Utah 1907, s. 2833.

[3] See, *inter alia*, Mill's Ann. Stat. Colo., Rev. ed. 1912, ss. 421–6; Fla. Comp. Laws 1914, ss. 2598–602; Hurd's Rev. Stat. Ill. 1915–16, pp. 134–6; Rev. Stat. Me. 1903, pp. 833–4; Page & Adams' Ann. Ohio Gen. Code 1910, ss. 12110–135; Stewart's Purdon's Dig. of Stat. Law of Pa. 1905, pp. 955–7, as amended by Supplement to same, p. 5852; Gen. Laws R. I. 1909, pp. 354–7; Shannon's Ann. Code Tenn. 1896, ss. 7332–53; Mass. Rev. Laws, 1902, pp. 718–22, as amended by Supplement to same, pp. 642–4, and also by Acts of 1911, c. 53, Acts of 1912, c. 163, and Acts of 1913, c. 563. Although many American statutes leave it wholly in the discretion of the trial judges to what extent the child's father shall be charged with its maintenance in bastardy proceedings, some of them prescribe a maximum which is ridiculously small—thus in Arizona this must not exceed $600; in Florida not more than $50 yearly for ten years; in Tennessee not to exceed $40 for the first year, $30 for the second, $20 for the third; in Illinois the maximum is $100 for the first year, and $50 for nine succeeding years.

to the unfortunate bastard the same rights against his progenitors to which his legitimate brother is entitled, can justice be done to him. It is to be hoped that the lead of the enlightened legislature of Norway will soon be followed by our Assemblies." [1]

**Carnegie Endowment for International Peace.**—To those (writes Dr. Bellot) who still retain some belief in the eventual supremacy of international law, the record [2] of the activities of the Trustees of the Carnegie Endowment Fund for the abolition of war contained in this book is of the greatest encouragement for the moment and full of promise for the future. It seems desirable even at the risk of repetition to restate Mr. Carnegie's object and the policy adopted by the Trustees. In making the munificent donation of $10,000,000 to the Trustees for the promotion of a World Peace, Mr. Carnegie only indicated his own views by declaring that in his belief the shortest and the easiest path to peace lay in adopting President Taft's platform contained in his address to the Peace and Arbitration Society, at New York, on March 22, 1910. But the only condition imposed upon the trustees by Mr. Carnegie was the injunction never to lose sight of the primary object of their trust, viz. the attainment of the speedy abolition of war between so-called civilised nations. In determining their policy, and in framing measures for its execution, the Trustees were given the fullest liberty of action.

In the proposed charter of incorporation of the Board of Trustees, the main lines of the policy of the Trustees and the measures adopted for its execution were laid down. The general objects are declared to be:

> To advance the cause of peace among nations, to hasten the abolition of war, and to encourage and promote a peaceful settlement of international differences, and in particular *inter alia*:
>
> (*a*) To promote a thorough and scientific investigation and study of the causes of war and of the practical methods to prevent and avoid it;

[1] A movement in this direction is already perceptible. In 1915 three bills were introduced in the Illinois Assembly, providing respectively for giving to every *child* the father's surname; making children born in and out of wedlock equally heirs of father and mother and their kindred; and providing for inheritance by illegitimate child from putative father whenever such paternity shall have been established. See Legislative Digest of 49th General Assembly, State of Illinois, H.B. 454, 455, 602.

[2] *Year Book of the Carnegie Endowment for International Peace*, 1916.

(*b*) To aid in the development of international law, and a general agreement on the rules thereof, and the acceptance of the same among nations;

(*c*) To diffuse information and to educate public opinion regarding the causes, nature, and effects of war, and means for its prevention and avoidance;

(*d*) To establish a better understanding of international rights and duties, and a more perfect sense of international justice among the inhabitants of civilised countries;

(*e*) To cultivate friendly feelings between the inhabitants of different countries and to increase the knowledge and understanding of each other by the several nations;

(*f*) To promote a general acceptance of peaceable methods in the settlement of international disputes;

(*g*) To maintain, promote and assist such establishments, organisations, associations, and agencies as shall be deemed necessary or useful in the accomplishment of the purposes of the corporation or any of them.

The general policy of the Board is directed by an Executive Committee. The particular measures are carried out by three departments entitled the Division of Intercourse and Education, the Division of Economics and History, and the Division of International Law. It is from the reports of the directors of these three departments that the results of their respective activities may be gleaned. The work of the first two departments has naturally suffered from the war. To carry on the work in Europe and Asia, either among belligerents or neutrals, was obviously impossible. In the case of the former department, however, the energies relaxed by the war were utilised in increased organisation and propaganda in both North and South America. So far from lessening the work of the Division of International Law, the war gave it an immense impetus. Apart from the fact that almost all its work is done directly by and in the division, without much outside assistance, the additional interest in international law stimulated by the war is shown by the large increase of correspondence seeking information, and the enormously increased demands for the Board's publications. To international jurists the declarations of Mr. N. M. Butler, director of the Division of Intercourse and Education, and of Mr. James Brown Scott, director of the Division of International Law, that the people of the United States, perhaps for the time, now understand the full significance of international law and of branches of that law, are of peculiar interest. The latter also refers to the marked

change of opinion among leaders of thought, who upon more mature reflection seem inclined to agree that if the practice of war is to be curtailed, it must be done through the medium of international law, backed by a public opinion powerful enough to enforce the application of its principles. One answer to the question on what particular lines action should be taken, was given by Senator Elihu Root in his address to the American Society of International Law, which Mr. Scott gives in full. Since Viscount Grey's recent adhesion to Mr. Taft's scheme embodied in the programme of the League to Enforce Peace—a somewhat unfortunate title—this address will be read or re-read with additional interest in this country. If the principles enunciated by Senator Root are applied, breaking the peace of the world will be regarded as a criminal offence is regarded in municipal law. Neutrality will disappear, since such an offence will be an offence against every state, which every state is concerned to prevent or to punish. If once it is recognised that under modern conditions war between two or more states cannot be isolated, but that its effects are seriously felt by all neutrals, it follows that every state affected is entitled to interfere, and indeed ought to interfere, in the endeavour to prevent a breach of the peace.

"Wherever in the world," declared Senator Root, "the laws which should protect the independence of nations, the inviolability of their territory, the lives and property of their citizens are violated, all other nations have a right to protest against the breaking down of the law. Such a protest would not be an interference in the quarrels of others." Just as every citizen is concerned in security from burglary and murder, so every nation is concerned in the aggression of one nation against another. "Upon no other theory than this," concludes Senator Root, "can the decisions of any court for the application of the law of nations be respected, or any league or concert or agreement among nations for the enforcement of peace by arms or otherwise be established or any general opinion of mankind for the maintenance of law be effective."

There is, however, one remarkable omission. Nothing is said of that fruitful cause of war, high tariffs. Only in the relations between North and South America does Mr. J. Bates Clark, director of the Division of Economics and History, refer to the "unreasonable limitations on commerce and on financial dealings" as causes of mutual irritation.

In the short period of its existence the Fund has done much to obtain wide support throughout the United States for the objects of its foundation.

**Diplomatic Agents of the United States.**—In the August number of the *American Political Science Review*, Mr. Henry Merritt Wriston discusses the appointment of special diplomatic agents. In the first part of his article he examined the extent to which the President of the United States is constitutionally justified in making such appointments; and in the second part he enumerates the purposes for which they have been made in the history of the foreign relations of the United States.

The writer considers that, whereas all other official agents are appointed to positions created by the Constitution or by statute, special diplomatic agents are not so commissioned; but he justifies their appointment upon four grounds. In the first place, he finds in s. 291 of the Revised Statutes, which authorises the President to give a certificate for such expenditure upon foreign relations "as he may think it advisable not to specify," an implied authority to appoint special agents; and he points out that Congress in a few Appropriation Acts has granted extra compensation to men who have served in that capacity. Secondly, he invokes the principle that the initiative in foreign affairs resides in the executive. Since the President must issue a separate commission for the negotiation of every treaty, and since not only regular diplomatic officers, but also members of the Supreme Court, naval officers, and even private individuals have been appointed for that purpose, there seems good constitutional precedent for the appointment of special agents, at any rate for the negotiation of treaties. Thirdly, the writer points out that all governments do in fact appoint confidential agents upon whom the legislature has not the usual financial checks. Fourthly, he argues that such appointments are justified by necessity, since publicity might defeat the purpose of the appointment.

In the second part of the article, Mr. Wriston divides special diplomatic agents into two classes: those possessing treaty-making powers, and those without them. In the latter class he enumerates agents sent to investigate and report, as for example Cæsar A. Rodney and others sent by President Monroe to South America, agents sent to countries seeking recognition, for example to Santo Domingo, agents sent to pave the way for a renewal of diplomatic

intercourse, agents commissioned to interchange ratifications of a treaty, and agents instructed to adjust a revolutionary situation. In the first class he mentions agents entrusted with the negotiation of a treaty of peace, agents sent to conclude a treaty with a power with whom the United States has had no previous diplomatic intercourse, agents commissioned to negotiate with barbaric states, as for example in 1832, when Woodbury was sent to Cochin China, Siam, and Muscat, and agents having power to arrange an auxiliary or explanatory treaty.

The writer concludes by stating that although the appointment of special diplomatic agents by the President has been frequently criticised, there is no case in which an appointment can reasonably be assailed as having been made without regard to the interests of the United States.

**Imperial Patent Law.**—At a recent meeting of the Royal Colonial Institute, Mr. F. B. Fetherstonhaugh, K.C., of Toronto, put forward proposals for an Imperial Patent Act which would have the following advantages:

1. The printing of patents concurrently in the Mother Country and in the several Dominions having Patent Offices, and the consequent spread of information as to industrial progress throughout the Empire—in short, each portion of the Empire will know the progress made by the other portion.

2. Uniformity of practice before the Patent Offices.

3. Uniformity in the laws and in legal procedure.

4. Uniformity of the term of all patents so that the date of expiration will be identical throughout the Empire.

5. Uniformity in connection with the working of patents and in the manufacture of the invention under the patent.

6. The consequent drawing together of the several countries of the Empire commercially, and in matters of trade and industry.

Mr. Fetherstonhaugh stated (*United Empire* reports) that it is well known that in the United States of America there are more patents granted than in any other country in the world, possibly fully a third more than in the whole British Empire. He submitted a series of statistical tables with the object of showing that in normal times (as in 1913) the United States issued 70,000 patents as against 40,000 issued in the Empire, exclusive of South Africa and the smaller dependencies. He contended that, when a patent is issued

for the Empire, a great many more patents will be issued in the aggregate, on account of the greater extent of territory covered, so that the fees instead of decreasing should increase in each country which would form a part of the Imperial Patent Office system. He considered that Great Britain, Canada, Australia, New Zealand, South Africa, and India should all have Patent Offices capable of issuing patents for the Empire and its dependencies, and that the administration of these Patent Offices might include registration of trade marks, designs and copyrights, and so simplify the procedure by making it uniform in each country of the Empire.

**Codification Reform in Egypt.**—Sir Malcolm McIlwraith in his final report as Judicial Adviser in Egypt describes the work which was done during the year 1915 upon the reform of the Code of Civil and Commercial Procedure, and at the same time discusses the value of codification from a long experience.

The Commission instituted by Ministerial Order of November 21, 1913, for the purpose of revising the Code of Civil and Commercial Procedure, has proceeded steadily with its difficult task throughout the year 1915, and the numerous discussions which have taken place have ranged over practically the whole field of procedure, with the exception of execution proceedings on real property, which still remain to be considered.

The time having accordingly arrived at which it seemed possible to start on the work of drafting, a preliminary project of certain chapters of the Code was submitted for discussion.

The Ministerial Order of November 21, 1913, which created the Commission, clearly indicated the lines on which the revision was to proceed. The preamble speaks of the preparation of a "Code de procédure basé sur la pratique actuelle devant les Tribunaux Mixtes et Indigènes," but insists on "l'utilité de s'inspirer des progrès réalisés en cette matière, au cours des dernières années à l'étranger," and of the necessity of taking into consideration "des critiques maintes fois adressées à la procédure actuelle dans les milieux commerciaux et dans la presse." At the inauguration of the Commission, the representatives of the Government were agreed that it should be the mission of this body to innovate freely in existing institutions.

The main difficulty (writes Sir Malcolm McIlwraith) in these questions of codification revision, and indeed in law reform generally, is to reconcile,

as far as possible, the opposing forces which are generally to be met with in these matters, among the classes of the community chiefly concerned, and which are usually more or less faithfully reflected in any official commission of a representative character, constituted to deal with them. On the one hand, there is the ultra-conservative element, instinctively, though often more or less unconsciously, averse to any important change, apt to regard all innovations in these delicate problems, as fraught with grave danger, and more or less strongly inclined to limit revision to the improvement of language and more logical co-ordination of subjects, without fundamental changes of principle. On the other hand, there is usually a more or less numerous contingent of ardent spirits, keenly desirous of effecting radical reforms, however subversive of existing institutions, enthusiastic about various pet panaceas of their own—which, it is suggested, would cure all the evils complained of—but who are sometimes insufficiently alive to the counterbalancing disadvantage of too thorough and abrupt a departure from local practice and traditions.

The task of an official commission is to harmonise, as felicitously as possible, these more or less conflicting tendencies, and to endeavour to find that happy mean which, in this as in so many other matters, is the obvious desideratum.

Certainly, we must do our best to guard against the danger of too precipitate and profound a break with the past. But it is no less necessary to eschew excessive timidity and exaggerated caution in the introduction of novel features. It would, indeed, have been scarcely worth while to constitute a commission of so many persons of eminence in the legal profession, expert on this subject, if the intention had merely been to amend drafting and improve arrangement.

The existing Codes of Procedure, Mixed and Native, are, of course, directly based on the French Code of Civil Procedure, and that Code is exceedingly out of date. In order to appreciate the necessity of far-reaching departures from such a model, it is only necessary to peruse the appreciations concerning it contained in the recent report of the Morocco Commission for the judicial organisation of the new Protectorate, composed of many of the most distinguished lawyers in France, and presided over by the illustrious M. Louis Renault, who is, to-day, perhaps the most celebrated and experienced of all continental jurists. This report observes:

"De tous les codes napoléoniens, le Code de Procédure Civile est celui qui porte le plus la marque de l'âge, d'une part parce que l'esprit novateur du dix-huitième siècle et de la Révolution ne l'a pas imprégné aussi profondément que les autres et qu'il n'est, dans une large mesure, qu'une réédition de la vieille ordonnance de 1667; d'autre part parce qu'il a été, depuis un siècle, moins remanié que ses contemporains et qu'à la différence de ceux-ci, il a été peu modernisé." (See *Bulletin Officiel du Protectorat*, September 12, 1914, No. 46.)

Modern English estimates of the same Code are no more flattering, notably as to its form and arrangement. The *Cambridge Modern History*, vol. ix. p. 166, remarks concerning it:

"When all allowance has been made for the difficulty of the task, it must be confessed that the arrangement of topics is singularly illogical and disorderly. The first part is entitled 'Procedure before the Courts' and the second 'Diverse Procedures.' The former is by no means a model of systematic treatment; while the latter, as its title implies, comprises a miscellaneous assortment of regulations dealing with such varied subjects as offers of payment by a debtor, judicial separation, and the procedure incidental to arbitrations or the opening of a succession."

It is doubtless, however, largely due to the special circumstances of France, concerning the monopolies of Ministerial offices (*avoués*, *notaires*, etc.) that reform in procedure has encountered special, and hitherto insuperable, difficulties in that country. Consequently, there is little assistance to be derived, in this matter, from French sources. But many other Continental countries whose laws were originally based on Napoleonic precedents, and which are, therefore, nearly akin to Egyptian legislation, have, in the course of the last century introduced notable reforms into their law and practice, and the Commission has naturally endeavoured to profit largely by their research and the experience thus acquired.

On the other hand, it has long been urged, with much force, that English procedure is, in many respects, superior to certain Continental models, and that whatever may be thought about the advisability of brusque and fundamental changes in a substantive law which has now been in force in Egypt for some forty years, and in spite of many defects has, on the whole, stood the test of experience fairly well, such objections have far less weight as regards changes in procedure. In Canada, it has been found that an essentially French system of law can be effectively combined with purely British machinery in its administration. Moreover, recent political events have drawn still closer the administrative ties between Egypt and Great Britain. It may therefore be anticipated that the new Procedure Code will draw largely on English models, while endeavouring to adapt them effectively to Egyptian conditions and fit them harmoniously into its somewhat complicated organisation. It is to be hoped that the Commission may, in the end, succeed in thus reconciling the many divergent views and aspirations prevalent, and be enabled to produce a Code which, though it certainly will not escape much criticism, may yet, in its entirety, be found acceptable by both native and European opinion. The task, however, is not an easy one. Even when all parties are agreed as to the intention and the object to be aimed at, the difficulties of apt expression of such intention in language sufficiently precise to meet all the contingencies which may arise often give rise to

considerable controversy, and the clash between different schools and methods of drafting is occasionally acute. For all these reasons, an early solution of all the difficulties encountered is hardly to be looked for, in spite of the zeal and diligence of those concerned in its execution.

**Admiralty Jurisdiction over Vessel under Requisition by Foreign Nation.**—The following note is taken from the *Columbia Law Review* (December 1916):

"A necessary adjunct of the idea of sovereignty is the principle that the State should not and cannot be sued in its own courts without its consent.[1] One expression of this idea running through English law is the maxim, 'The king can do no wrong.' Similarly, sovereigns have by comity and the law of nations been granted immunity from the jurisdiction of the courts of foreign sovereigns, though according to general principles of jurisprudence a Court's jurisdiction is founded on the presence of the person or property within the state.[2] This exemption extends not only to the person of the sovereign and his ambassadors, but to his property, at least so far as it is within his control and connected with his public functions.[3]

"The same principle has been followed in a suit *in rem* against the public property of a foreign nation,[4] notably in the case of libels in admiralty against foreign warships and other public ships of foreign governments, in which cases the Courts have declined to exercise their jurisdiction gained by the attachment of the ship.[5] An apparent exception to this immunity is in the case of a libel *in*

[1] *Young* v. *SS. Scotia*, (1903) A.C. 501; see *Briggs* v. *Light-Boats*, (1865) 93 Mass 157.

[2] Bynkershoek, *Opera Minora* (ed. 1752), 435.

[3] *Magdalena Steam Nav. Co.* v. *Martin*, (1859) 2 E. & E. 94: "One sovereign, being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication and will be extended to him." *The Exchange*, (1812) 11 U.S. 116, 137; see *The Santissima Trinidad*, (1822) 20 U.S. 283. Even though the sovereign is living within the territory of another state incognito, he may at any time resume his foreign personality with its appurtenant immunities. *Mighell* v. *Sultan of Johore*, (1894) 1 Q.B. 149.

[4] *Leavitt* v. *Dabney* (N.Y. 1868), 37 How. Pr. 264; see *Smith* v. *Weguelin*, (1869) L.R. 8 Eq. 198.

[5] *The Exchange*, supra; *The Constitution*, (1879) L.R. 4 P.D. 39; *The Parlement Belge*, (1879) L.R. 5 P.D. 197; see *The Charkieh*, (1873) L.R. 4 A. & E. 59.

*rem* to recover for salvage against the property of a foreign government, although destined for public use, when at the time of seizure the property was not actually in public service or in the possession of an officer of the government.[1] The theory of this exception is that the action may be maintained without disturbing the possession of the government.[2]

" Thus the question of the actual possession of the government seems to be the touchstone of all the cases, and what constitutes such possession has become a question of great importance in connection with the now prevalent practice of requisitioning all merchant ships by the various belligerent powers. When a nation requisitions a trading vessel, directs it to go to a certain port for a certain cargo and return with it to a port indicated by the government for a stipulated remuneration, but places no officer on board and leaves the entire navigation and charge of the ship to the servants of the owner, can it be said that such a vessel is so far in the possession or control of the government that she, the ship, shall not be answerable legally for her torts or liable for other maritime liens,[3] out of courtesy to the nation which requisitioned her ? This question was answered in the negative in the recent case of *The Attualita* (C. C. A. 4th Cir. No. 1479, Oct. 6, 1916). There a privately owned trading vessel sent to this country for a cargo of cereals under requisition by the Italian Government, but under the control of the employees of the owner, was libelled for damages resulting from a collision. On plea of immunity the Circuit Court of Appeals held, reversing the District Court, that a ship in these circumstances was not entitled to exemption from jurisdiction. The Court seemed

[1] *The Davis*, (1869) 77 U.S. 15 ; *United States* v. *Wilder* (U.S. C.C. 1838), 3 Sumn. 308. " In claiming exemption from the ordinary process of the Court, the burden of proof is clearly upon the claimant to prove, by competent evidence, all the facts necessary to sustain this defence "—that the property has become the property of the government and is in possession of some person proved its officer. *Long* v. *The Tampico* (D.C. 1883), 16 Fed. 491, 500.

[2] *The Johnson Lighterage Co.*, No. 24 (D.C. 1916), 231 Fed. 365.

[3] It is a fundamental principle of the law of admiralty that a collision gives to the party injured a right *in rem* in the offending ship without regard to personal responsibility, the ship itself being considered the wrongdoer, liable in an action *in rem* for the tort and subject to a lien for the damage. See *The Barnstable*, (1900) 181 U.S. 464, 21 Sup. Ct. 684. However, where such an offending vessel was the property of a foreign sovereign and engaged in public service, it was held immune from arrest in a proceeding *in rem* for damage caused by collision. *The Jassy*, (1906) P. 270.

to be influenced largely by the fact that the persons in charge of the navigation of the ship remained the servants of the owners and that no government official was placed on board, so that the ship could not be said to have been in the actual possession of the government. The requisition being in effect the same as a charter-party, except that the owners had no volition in the matter, the action *in rem* might be maintained without disturbing the possession of the government. This decision shows the policy of the Court, though there had been strong dicta to the contrary,[1] not to extend this principle of comity and create a class of vessels for which no one is responsible in any way, at a time when the practice of requisitioning merchant vessels is so common."

**Supply of the Journal.**—In response to the large demand for the supply of odd copies of the Journal it has been arranged that the Publisher will sell copies of the numbers which are still in print down to and including No. XXXIV. (the consolidated index). The Secretary has a few copies of out-of-print numbers available for subscribers to complete their sets. The numbers issued during 1916 can only be supplied to subscribers of one guinea and the subscription for 1917 will entitle subscribers to the numbers issued during the year. It was due on January 1.

**The Society's Address.**—Correspondents are requested to note that all communications, whether for the Editors or the Secretary, should be addressed to 3 (North) King's Bench Walk, Temple, E.C.

[1] *The Athanasios* (D.C. 1915), 228 Fed. 558; *The Lugi* (D.C. 1916), 230 Fed. 493. In the latter case, after the requisitioned vessel had been libelled, the owners gave bond for its release, and the Court held that it would retain jurisdiction of the action on the bond, as that could not affect the rights of the foreign government.

# REVIEWS.

## INDIA.

A NEW volume[1] in that excellent series, the "Historical Geography of the British Dependencies," carries the history of India down to the end of the East India Company, and includes the century recently handled on different lines by Professor Ramsay Muir in his *Making of British India*. It is to be followed by a second Part. The author is Mr. P. E. Roberts, who contributed an important chapter on India to the "Cambridge Modern History." He has to repeat a familiar tale, several parts of which have been told by brilliant and competent writers, though a history of British India on an adequate scale, such as that which was contemplated by the late Sir William Hunter, and of which he constructed a portico, still remains to be written. Among comprehensive summaries of that history Mr. Roberts's little volume will take a high place. His style is clear and attractive, he has explored diligently and usefully the India Office archives, and he has studied the recent authorities, such as M. Prosper Cultru's *Dupleix*. His estimates of the character and actions of the great empire-builders, Clive, Warren Hastings, Wellesley, Dalhousie, is discriminating and impartial, and he is not afraid to differ on some points from such high authorities as Sir Alfred Lyall and Sir George Forrest, or to qualify their judgments. Perhaps his freshest and most interesting chapter is that on the "Life of the English in the East." About that life, as led in Bengal towards the end of the seventeenth century, we learnt much several years ago from Sir Henry Yule's edition of the Diary of Sir William Hedges, and, quite recently, a search-light has been thrown on English life about the same time, but on the other side of the peninsula, by Mr. and Mrs. Strachey's book on *Keigwin's Rebellion*. This was the time when the famous Sir Josia Child was ruling in Leadenhall Street, and was doing his best to preserve the monopoly of the East India trade for a close ring of merchants, and when Sir John Child was Governor of Bombay. It may be noticed that Mr. Roberts follows the traditional view that Josia and John were brothers, a view which has been combated, and apparently overthrown, by Mr.

[1] "A Historical Geography of the British Dependencies," Vol. vii. India, Part I, *History to the End of the East India Company*. (Oxford: at the Clarendon Press.)

and Mrs. Strachey. Perhaps he does not accept their arguments, but more probably their monograph did not reach him in time. Despite the labours of Yule and many others, there is still much to be garnered from the field of Indian archives, and Mr. Roberts has worked that field with much profit to his readers. We are told about life in the English factories: "The factory was the commercial counterpart of a University college. Meals were taken in common till about 1720; there were daily prayers, and the gates were closed at stated hours. The President was given disciplinary control over the younger members." In such an establishment, as at an Oxford or Cambridge college, there was no room for ladies, but soon after the acquisition of Bombay the experiment was made of sending out twenty single women of sober and civil lives. It is regrettable to learn soon afterwards that some of the ladies "are grown scandalous to our nation, religion, and government." So these light ladies were threatened with a diet of bread and water until they could be sent home. There is much about duelling, drink, and gambling, evils which the earnest exhortations of the Directors at home were unable to suppress. The Directors' suggestion that cold tea might be a healthful substitute for stronger drinks was not appreciated. The expenditure of public money, or at all events of the Company's money, was not always such as would pass muster with our Public Accounts Committee. St. Helena was then under the East India Company, and among the items of the Governor's expenditure which were criticised by the Directors are "a shed of 400 feet long, for no other use than that he may ride therein on his asses, and be covered from the weather." "The charge of the new path hath and will cost us £1,000, . . . a banqueting house is to be made half way up, and a place for nine pins." Labour for months had been employed on "a tomb of 10 feet high and 7 feet broad of cut stone for his wife." These items were debited to "fortifications."

Quotations of this kind might be multiplied indefinitely, but enough has been said to show that Mr. Roberts's little book is not only a useful, but a very readable addition to a valuable series.

C. P. I.

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## EGYPTIAN CRIMINAL LAW.

MODERN Egyptian criminal law is embodied in a revised Native Penal Code and Code of Criminal Procedure, which were promulgated in February 1904, and came into force in April of that year, and which, with certain important subsequent alterations, more particularly in the Code of Criminal Procedure, now constitute the substantive and adjective law, upon which Mr. Goadby's work[2] is a commentary at large. And the first thing

[1] *Commentary on Egyptian Criminal Law.* By Frederic M. Goadby, M.A., B.C.L. Part I. pp. xxvi+556. (Cairo: Government Press, 1914)

about it that strikes one is that a country like Egypt, historically so ancient but politically so modern, has had the wisdom to codify its criminal law and procedure. The learned author points out that in so doing Egypt has simply followed the example of France (the Egyptian Penal Code being much indebted to that of France), Belgium, Italy, and Germany—while England lags behind, the English criminal law being "composed partly of uncodified common law, partly of partially codified common law, and partly of new legislation." As might be expected, the author brings to his task a large amount of learning, enthusiasm, and industry, and the list of his references and abbreviations shows that he has read widely and deeply on the subject. Besides an Introduction (in which he touches on, *inter alia*, the Purposes of Punishment, Primitive Ideas of Criminal Law, and Modern Tendencies in Criminal Law), in this first part he deals with Offences—their nature and classification, the Conditions of Criminal Liability, Justification, Plurality of Offenders and Punishments, besides the Criminal Misappropriation of Property, Coinage Offences and Falsification, Corruption and Bribery, Criminal Trespass, Wilful Arson, Wilful Destruction and Damage, Press Offences, Defamation, and Disclosure of Secrets; reserving to the second part of the work offences against the person, in regard to which important alterations in the Egyptian law are in prospect. Naturally in dealing with the subjects above mentioned, the author is limited by the provisions of the Penal Code upon which he is commenting, and the needs of the students to whom he was lecturing, but he contrives to enunciate in addition the general principles of criminal law of various countries applicable to the subject in hand, and to introduce many valuable and interesting comparisons and parallels. Nor does he confine himself to the mere law, but he also goes into its administration, and the whole field of criminology and penal science, holding that "civil law is impersonal. . . . But in the application of the criminal law the personality of the offender is all-important."

The book is issued under the auspices of the Egyptian Ministry of Justice, but the author very properly states that it has "no official character," and that he alone is responsible for the statements contained in it.

If the second part of the work is as good as the first (and we hope that Mr. Goadby may be able to complete it), the whole work will prove one of value and utility and an important contribution to the literature of this great subject.

G. G. A.

## RUSSIAN LAW.

This new edition of a work [1] by an eminent representative of his country and the Consular Service generally will have an interest and an importance for all students of international commercial relations, as an authoritative exposition of the duties of a class of officials who are the eyes of their national Government in a foreign State, and who have the responsibility for promoting their countries' trade and assisting their countrymen in their business and social relations with the inhabitants of that State. As one might expect from the long practical experience of Baron Heyking gathered in several European countries, the book is a carefully digested summary of the Russian laws and regulations relating to every branch of consular duties, supplemented by references to the comparative legislations and rules of public and private international law, which forms an admirably practical guide for the whole subject. The main divisions of the work include (1) consular rights and duties generally; (2) supervision of commerce and shipping; (3) sanitary matters; (4) documents, such as passports, certificates of origin of goods, bills of exchange, etc.; (5) assistance to Russian subjects; (6) Russian merchant ships; (7) Russian Imperial Navy; (8) consular fees; (9) Russian Customs regulations; (10) and (11) the legal position of foreigners in Russia as regards commerce, property, occupations, and particular industries, and (12) that of Russians in Great Britain.

The concluding portion—other than a maritime vocabulary of nautical expressions in different languages—has a special interest for ourselves, being a reasoned argument that Great Britain should enter into conventions with other States giving a distinct legal status to consular officers as has been done by the Continental States—a contention which the author submitted in a previous number of this Journal (October 1913). Although the privileges granted in other countries to consuls as regards exemption from income tax and the like are equally accorded here, yet the legal position of the foreign consul in Great Britain or British Dominions is not different from that of any other foreign subject, and the only State recognition is the *exequatur* by which the Crown gives them leave to fulfil their functions in its dominions. The author points out that, except for an agreement between Russia and Great Britain respecting estate left by sailors on board ships of their nationality made in 1880, the only treaty between the two nations is the general Treaty of Commerce and Navigation of 1889, by which the consuls of the two Powers are given the powers, privileges, exemptions, and immunities of the consuls of the most favoured nation. The effect of this is to give us the benefit of the Consular Conventions between Russia and other States, but no

[1] *A Practical Guide for Russian Consular Officers.* By Baron A. Heyking, D.C.L., Imperial Russian Consul-General in London, Second Edition. Pp. 445. (London: P. S. King & Son, Ltd., 1916.)

reciprocal advantages to Russia; and there seems to be justification for the author's comment that in this movement Great Britain alone has lagged behind, and has left the consular status and the definition of the competency of foreign consuls in British Dominions in a position which no longer satisfies the modern requirements of international intercourse. The question of consular jurisdiction over their national seamen is cited as an instance of the unsatisfactory position of foreign consuls in our law.

Assuming it to be a rule of international law that the consul has a right and duty to inquire into differences between captains and crews relating to questions of internal discipline of the ships and local authorities can only interfere where the public peace is disturbed or outside persons are concerned, the author regards it as unjustifiable that British Courts should take cognisance of questions involving the construction of ship's articles such as wages and discipline, and he suggests that the principle of absolute territorial sovereignty should be modified in the case of consuls similarly to that of foreign diplomatic representatives under the statute of 1709. Possibly the author puts too high the view of Continental States as to consular jurisdiction over nationals as being a rule of international law. In the United States it has been judicially held that this is not as of right apart from express convention. But his book gives ample evidence of the variety and importance of a consul's duties, and the consequent practical necessity for his enjoying a privileged position. The author is to be congratulated on this new edition of a valuable and learned work, which has become a standard authority on its subject.

G. G. P.

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## AGRICULTURAL LEGISLATION.

THE YEAR-BOOK OF AGRICULTURAL LEGISLATION[1] classifies its various subjects into the eleven headings under which in previous volumes the material has been usually arranged. Each of these headings, from one point of view or another, deserves study. But, at the present crisis, the most interesting subject will probably be the attempts made by belligerent nations to maintain the supply, control the price, and regulate the consumption of food. In these directions there has been great activity even among neutral nations. The United Kingdom, however, has hitherto confined itself almost entirely to requisitioning certain products at fixed prices for naval or military purposes.

Under the heading of Trade in Agricultural Products, are given the laws and decrees relating to trade in cereals, in other food products,

[1] *Annuaire International de Législation Agricole.* V^me^ Année, 1915. (Rome, 1916.)

in manures, in feeding stuffs, in live-stock, etc., as well as the measures taken for averting or counteracting the rise in prices. Those of Germany are the most detailed, and the method of dealing with grain convertible into flour—wheat, rye, barley, and oats—may be taken as an illustration of the general principles.

The legislation is contained in a series of decrees issued between January 25 and August 19, 1915. Each edict is in force till it is superseded by another; but, though subsequently amended in detail, the edict of January 25, 1915, laid down the general lines of the proceedings adopted.

All the cereals enumerated above, whether on the premises of the grower, in the stack or threshed; or in the hands of millers ground or unground; or in those of wholesale or retail merchants; or in those of bakers, etc., were taken over by the Government as from January 1, 1915. No movement of stocks out of the district was permitted without special licence. Certain exceptions of a limited kind were granted. Growers were, for instance, allowed to retain sufficient grain for the spring growing, and for the private use of themselves, families, and staff, at the rate of 9 kilograms per head per month. The remainder of the cereals was placed absolutely at the disposal of the three public bodies whose duties are defined in the decree. Any holder of cereals or flour who parts with it without a licence, or feeds any portion of the grain to live-stock, is liable to a maximum penalty of one year's imprisonment or a fine of 10,000 marks. Holders of the grain or flour are responsible for the custody of the stock till it is transferred to the public authority, and are entitled to compensation for its storage. The stock is paid for by the public authority at the time of transfer, and the purchase price is fixed at the mean price prevailing in the principal markets of the district during the fortnight preceding the issue of the decree. Millers are obliged to grind the corn for a fixed price, and only one quality of flour is allowed.

The corn, whether in grain or flour, thus seized and fixed in the district, is disposed of by one or other of the three public bodies co-operating for the purpose. The Imperial Distribution Office (*Reichsverstellungsstelle*) consisted of nineteen members. It is charged with the administrative duty of ascertaining the quantity of bread-stuff available in each district, and of fixing the proportions in which it shall be distributed among the districts, as well as between the civilian population and army and navy. On the commercial side of its work it is associated with the *Kreigsgetreibe-Gesellschaft*. This limited liability company for corn-dealing during the war, consisting of twenty-four persons, purchases from the holders of the stock of grain or flour, through Communal Associations, the quantities required for military and naval purposes and for the support of the civilian population in districts where the supply is deficient. Besides these two Central Offices, local bodies are set up in every part of the country, known as Communal Associations, charged with the duty of controlling the

supplies allotted to their districts by the Imperial Office of Distribution, and of selling and transmitting their surplus to the Central Corn-dealing Company.

The first duty of the Communal Associations is to furnish the Distribution Office with returns of the total quantity of corn and flour in its district, the amount required for its own population, and a statement of the resulting surplus or deficit. It is armed with adequate powers for the purpose. The Communal Association also acts as the intermediary from which the Central Corn-dealing Committee purchases its supplies. It is, therefore, empowered to requisition suitable buildings in which the stock of grain and flour within the district may be stored. But besides assisting the Central Offices in their administrative and commercial work, the Communal Association is charged with the duty of administering the supply allotted to its district, and distributing it equally and impartially. In the exercise of these functions, it controls the supplies issued to bakers. It may prescribe one uniform type of bread, forbid the baking of cakes or rolls, order the closer milling of flour, regulate the number of loaves to be sold at certain places and hours, and fix the price on the basis of the cost of the grain and the milling. If the Association is able to economise in the distribution of the supply allotted to the district, it returns the surplus saved to the Corn-dealing Company, and receives a bonus of 10 per cent. for the purchase of other food for its population. Any commune of 10,000 inhabitants or upwards may claim to be a Communal Association for its district.

The provisions of the decree of January 1915 have been amended by later decrees; but the organisation of the Central Offices with their administrative and commercial duties, and of the local Communal Associations, remained unchanged in its main features. The Communal Association is also utilised to secure the cultivation of the land. Every occupier is obliged, if called upon by the administrative authorities, to declare his intention of sowing the whole of his holding or to indicate what portions he does not intend to cultivate, and to furnish satisfactory proof that he has the means of carrying out the work. If the administrative authority is not satisfied, the occupier may be deprived of the whole or a part of the holding, which is transferred temporarily to the Communal Association for cultivation on payment of an indemnity to the occupier.

The examples selected illustrate the important bearing which the contents of the Year-Book for 1915 have upon problems that the United Kingdom may in the near future be called on to solve.

ROWLAND E. PROTHERO.

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## THE MADRAS CODE.

MADRAS is the senior Presidency in India, but its boundaries do not appear to have been altered since laws were first passed for it. It is, therefore, not necessary to divide the code of laws now in force into so many Parts as have been required for other Provinces. The Code[1] contains (1) the unrepealed Regulations of the Governor in Council (none after 1834); (2) the unrepealed local Acts of the Governor-General in force in Madras (passed after 1834); (3) the unrepealed Regulations in force made under the Statute (Government of India) of 1870; (4) the unrepealed Acts of the Madras Legislature (passed between 1862 and 1914). The Part last named ends with the Acts of 1884 in Vol. I., beginning with Acts of 1885 in Vol. II. The title-page shows this division of contents by the years mentioned, there was no change in the legislature between 1884 and 1885. The second volume contains, in an Appendix, lists of enactments declared to be or not to be in force, or to be extended, by notification under the Scheduled Districts Act of 1874, in the districts called Scheduled Districts in the Presidency: also, Rules and Orders under the Scheduled Districts Act, of which the Rules for the guidance of the Government Agent in Godavari, and those under the Ganjam and Vizagapatam Act of 1839, for Civil Justice, Revenue, and General, form in themselves fairly complete chapters of law applicable to those backward tracts. The result is that the whole of the law locally in force in the Madras Presidency (as distinguished from the general Acts in force throughout India) is contained in two volumes, which are available for handy reference to every official and legal practitioner. Such a work requires microscopic care in editing: the only slip noticed is a typographical error on page xv of the first volume.

C. E. BUCKLAND.

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## SUMMARY OF WAR LEGISLATION.

THIS little volume[2] is intended by the editor, Mr. Howard D'Egville, Hon. Secretary of the United Kingdom Branch of the Empire Parliamentary Association, for the use of its members, and more particularly for those beyond the seas. It does not purport to be exhaustive either of this particular legislation or even of those statutes with which it deals. It is designed to impart in a handy form "some account of the main pro-

[1] *The Madras Code.* Fourth Edition. 2 vols. (Calcutta: Superintendent Government Printing, India, 1915. 6 rupees = 9*s.* each.)

[2] *Summary of Emergency Legislation passed by the Parliaments of the Empire in consequence of the War.* Edited by Howard D'Egville. (The Empire Parliamentary Association.)

visions of the Emergency Acts of general interest passed up to a recent date in each Parliament, and as far as might be advisable, some indication of the necessity for introducing such Acts." Much of this emergency legislation has been accomplished by means of Proclamation. The substance of many is here set forth, but the editor has found it impossible owing to considerations of space to refer to others of almost equal importance.

When we consider that the British emergency legislation alone, with which this work is concerned, runs to four volumes of no mean proportions, the task of compressing the whole mass of Imperial legislation into a hundred pages appears hopeless. But we are bound to say that in his selection of the documents Mr. D'Egville has shown a discrimination only equalled by his treatment. The object of each particular Act, and as a rule its substance, are given with remarkable precision and lucidity. For the purpose therefore of enabling the layman to obtain a bird's-eye view of the comparative measures taken by the various independent Governments within the Empire in connection with the war this work is admirable. But for the legal practitioner with a problem to solve or for the jurist who wishes to compare the provisions of statutes or orders dealing with the same objects, this book can have little, if any, value.

No one would gather from this epitome, of for instance the Defence of the Realm Acts, the most serious inroads which have been made in the common law. Under the old law a person, whether military or civil, during a state of war or rebellion, acting reasonably and in good faith, might and was in duty bound to interfere with the rights of property and with personal liberty, provided such interference was for the "maintenance of the Commonwealth." But such person acted at his peril. His action was liable to be reviewed in the civil courts. He was liable at the suit of the party damnified to civil damages or criminal penalties. By the Defence of the Realm Acts, military persons acting under their provisions can no longer be challenged. These Acts, without in any way increasing the powers of naval and military authorities during a state of war, have abolished the common law right of the subject to that redress to which he was entitled, provided he could show that those authorities had acted in bad faith or without probable and reasonable cause in maintaining the defence of the realm. This wholly unnecessary subordination of the common law to militarism is as great a blot in the Acts as the attempted substitution of courts-martial for civil courts in the trial of civilians.

Another serious blot is the power, now held to have been rightly delegated by Parliament to the executive, of suspending the right of the subject to a writ of *habeas corpus*. By Regulation 14*b* of June 10 (not the 15th as Mr. D'Egville has it), a British subject may be arrested and imprisoned without trial. Under the former constitutional practice

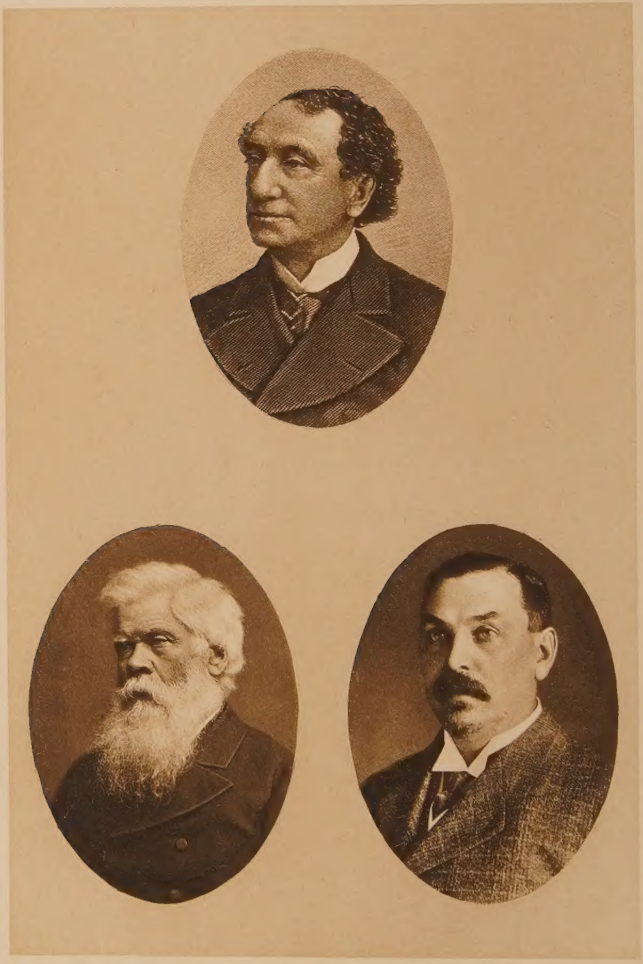
Parliament has frequently, by express enactments, suspended the operation of some or all of the provisions of the Habeas Corpus Acts, but never till the Defence of the Realm Act, 1914, has it attempted to effect this suspension by delegation to the executive. In *Rex* v. *Halliday*[1] it was held by the Divisional Court and the Court of Appeal that Reg. 14*b* was not *ultra vires*. It may be that in the interests of public safety British subjects, suspected only of assisting the enemy, should be imprisoned without trial. If such is the case, their right to a writ of *habeas corpus* should only be denied by an express enactment of Parliament. It is certainly open to argument whether Parliament intended to delegate its legislative power to the executive, and if it did to such an extent as this. Such a course has never been adopted before, and never since the days of the Stuarts has this birthright of the British subject been suspended by an Order in Council.

Although Mr. D'Egville sets out the Declaration of Paris in full, and gives the subjects of the Declaration of London, he entirely omits to give even the substance of the famous Reprisals Order in Council of March 11, 1915, whereby the so-called blockade of Germany was instituted. There is no suggestion from him that any of its provisions might be found inconsistent with those of the foregoing Declarations. This anomaly has now been partly removed by the abrogation of the Declaration of London, but it may still have to be met when claims for compensation by neutrals are made.

To the constitutional and international jurist alike, these emergency statutes are not pleasant reading. Constitutional privileges and international usages, the fruits of arduous struggles and sufferings in the past, have been too lightly abandoned. Indeed in some instances they have been abandoned without any real necessity or justification, in such a manner that suspicion arises whether some of this emergency legislation is intended to be quite so ephemeral as it professes to be.

HUGH H. L. BELLOT.

[1] [1916] 1 K.B. 738.



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